JD(ATL)–11–06
Scottville, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

FIVECAP, INC.

and	**CASES**	**7–CA–37282**
		7–CA–37192
GENERAL TEAMSTERS UNION		**7–CA–37296(1)**
LOCAL NO. 406, INTERNATIONAL		**7–CA–37296(2)**
BROTHERHOOD OF TREAMSTERS,		**7–CA–37296(3)**
AFL–CIO		**7–CA–37514**
		7–CA–37581(1)
		7–CA–37581(2)
		7–CA–37581(3)
		7–CA–37581(4)
		7–CA–37581(5)
		7–CA–37581(6)
		7–CA–37629
		7–CA–37771
		7–CA–37779
		7–CA–39503
		7–CA–40230
		7–CA–40465
		7–CA–40721

Steven E. Carlson, Esq., for the General Counsel.
Richard D. McNulty, Esq. (Cohl, Stocker & Toskey), of Lansing, Michigan, for the Respondent.

DECISION

Statement of the Cases

Keltner W. Locke, Administrative Law Judge. This case comes before me to determine the backpay liability of FiveCAP, Inc. (the "Respondent"). I conclude that, for the period covered by the Compliance Specification, Respondent will satisfy its obligation to make the discriminatees whole by paying to them the following amounts, plus interest as computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and less tax withholdings required by federal, state, and municipal law

Discriminatee Total Net Backpay:

Melissa A. Kukla	$ 31,305.66	Dale R. Smith	$ 79,629.67
Jane E. Myers	$ 12,944.40	Tom Belongia	$150,438.40
Amanda Lange	$ 14,266.16	David Monton	$128,437.20
Karen A. Gajewski	$ 68,041.77	Art Burkel	$ 3,591.00
Verna Fugere	$140,621.96	Bruce Kent	$ 29,830.32
Florence Feliczak	$ 71,769.36		

Procedural History

On August 25, 2000, the Board issued a decision in *FiveCAP, Inc.*, 331 NLRB No. 157, holding that Respondent was an employer within the meaning of the Act and subject to the Board's jurisdiction, concluding that Respondent had committed a number of unfair labor practices, and ordering Respondent to reinstate the following employees: Tom Belongia, Dale Smith, Verna Fugere, David Monton, Arthur Berkel, Melissa Kukla, Karen Sandstedt (identified in the Specification as Karen Gajewski), Amanda Lange and Jane Myers. Further, the Board ordered Respondent to make these individuals whole, with interest, for the losses they suffered because of Respondent's unlawful discrimination against them.

On October 31, 2000, the Board issued a decision in *FiveCAP, Inc.*, 332 NLRB No. 83. It ordered Respondent to reinstate and make whole employees Florence Feliczak and Melissa Kukla. (Kukla appears as a discriminatee in both the August 25, 2000 and October 31, 2000 decisions because Respondent unlawfully discharged her twice. After the first discharge, Respondent reinstated Kukla but then constructively discharged her.)

On June 28, 2002, the United States Court of Appeals for the Sixth Circuit issued a judgment and opinion enforcing the Board's August 25, 2000 and October 31, 2000 decisions in all respects except as it related to the temporary layoff of employee Art Burkel.

On November 17, 2004, the General Counsel, by the Regional Director for Region 7 of the Board, issued a Compliance Specification and Notice of Hearing (the "Specification"). Respondent filed an Answer dated December 14, 2004.

On March 29 through 31, 2005, I conducted a hearing in this matter in Grand Rapids, Michigan. Counsel filed post–hearing briefs, which I have considered.

The Allegations

Specification Paragraph 1

Paragraph 1 of the Specification alleges that the amount of backpay due the discriminatees is the amount of wages they would have received, but for the discrimination against them. Respondent's Answer admits this allegation "with the exception of Ms. Feliczak." Respondent's Answer asserts that the remedy for Ms. Feliczak "is limited to two weeks back pay, and the Administrative Law Judges [sic] Order of reinstatement is not appropriate given the appellate

disposition of the charges in this manner. *Yorke v. NLRB*, 709 F.2d 1138 (7th Cir. 1983), *Transmarine Navigation Corp.*, 170 NLRB 389 (1968)."

Although Respondent's Answer asserts that Feliczak should only receive two weeks backpay, its post–hearing brief takes a different position which would result in approximately 20 months of backpay. Before discussing this position, however, it will be helpful to review the facts.

Feliczak worked for Respondent as a data entry clerk. Respondent terminated her employment effective April 9, 1997, stating that it was installing computers in all offices, making a central data clerk position unnecessary. The Board did not find that Feliczak's discharge violated Section 8(a)(3) and (4), as the General Counsel had alleged, but did find that Respondent violated Section 8(a)(5) by changing working conditions, resulting in the termination of Feliczak's employment, without first bargaining with the Union.

The Board's October 31, 2000 decision included a finding that Respondent discriminated against another employee, Melissa Kukla, in violation of Section 8(a)(3) and (4). In the Order section of this decision, the Board grouped Feliczak and Kukla together and specified the same remedy, even though Feliczak had lost her job because Respondent had violated Section 8(a)(5) and Kukla lost her job because Respondent had violated Section 8(a)(3) and (4). The Board's order directed Respondent to take the following action:

> (c) Within 14 days from the date of this Order, offer Florence Feliczak and Melissa Kukla full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits they suffered as a result of the discrimination against them, in the manner set forth in this decision.

Although this order requires Respondent to make Feliczak whole for any loss of earnings and benefits she suffered "as a result of the discrimination against" her, Respondent argues that there has been no finding of unlawful discrimination in Feliczak's case. More exactly, Respondent asserts that the Board never found that Feliczak's discharge violated either Section 8(a)(3) or 8(a)(4) – the Act's two provisions prohibiting certain discrimination by employers – and therefore, the typical remedy for such discrimination is inappropriate. Thus, Respondent's brief states:

> There has never been a determination that Ms. Feliczak's lay–off was the result of union activities. Further, there has never been a question that FiveCAP actually eliminated Ms. Feliczak's position for legitimate business purposes. Rather, the only finding is that FiveCAP failed to bargain.

Respondent further argues that it did indeed negotiate with the Union, resulting in a collective–bargaining agreement with provisions allowing management to establish the number of personnel required, to combine and reorganize any part of its operations, and to determine layoffs as needs dictate. Accordingly, Respondent contends, Feliczak's backpay should terminate as of the date the contract went into effect because at that moment, Respondent acquired the right to lay off employees unilaterally.

Respondent's brief states that there "is no question that Ms. Feliczak is entitled to backpay for the period up to December 31, 1999." At that point, Respondent "had the unilateral right to determine, without bargaining, to lay off Ms. Feliczak and eliminate her position."

Respondent's argument, however, rests on speculation. It could have reinstated Feliczak at any time between April 1997, when it discharged her, and December 31, 1999, when, it contends, it obtained authority to eliminate her position unilaterally. If it had put Feliczak back to work during this period, then it would have faced a new choice after December 31, 1999, namely, whether it should continue to employ Feliczak as a central data entry clerk or eliminate that position. Presumably, Respondent would make a choice based upon the circumstances that existed on or after December 31, 1999.

However, Respondent did not reinstate Feliczak and thus did not restore the status quo ante. Instead, it perpetuated the unlawfully changed working conditions. Thus, it never was in a position where it could decide to lay off Feliczak lawfully.

Before Respondent could make a *lawful* decision to eliminate Feliczak's position, three conditions had to be present: (1) Feliczak's position existed, (2) Feliczak was working in that position, and (3) the Union agreed or, in the absence of the Union's agreement, Respondent had acquired the right to act unilaterally under some established principle such as waiver or impasse.

Respondent's argument goes only to the third condition. It asserts that as of December 31, 1999, the Union had waived the right to bargain over the elimination of this position. However, Respondent cannot seriously contend that the first condition was satisfied because Feliczak's position did not exist; it had been eliminated unlawfully and never restored. Likewise, Respondent has no basis to argue that the second condition existed; Feliczak certainly wasn't on Respondent's payroll or working.

Respondent's argument rests on conjecture about what it *would* have done if it had remedied the unfair labor practice and restored Feliczak to her job. Since Respondent had not remedied the unfair labor practice, I will decline its invitation to assume facts not in evidence.

It is well established that in a compliance proceeding, any uncertainty is resolved against the wrongdoer. *Florida Tile Co.*, 310 NLRB 609 (1993). There can be no certainty about a decision Respondent *might* have made in 2000 under circumstances which did not then exist. That kind of hypothesizing lies in the same realm as imagining what our country would be like if the British had won the Revolutionary War. However, the present case is not before a bewigged judge of a Royal Labour Relations Board in some parallel universe; it must be decided based on what actually happened (and what actually did *not* happen).

What actually did not happen is this: Respondent never made a decision to eliminate the data entry clerk position at any time it lawfully could have made such a decision unilaterally. Likewise, Respondent never made a lawful decision to lay Feliczak off at any time she was actually working for (and therefore capable of being laid off by) the Respondent.

If Respondent had reinstated Feliczak sometime before December 31, 1999, and had she therefore been on the payroll on that date, when Respondent arguably became able to lay her off

lawfully, we would know for certain whether Respondent actually laid her off. Absent such conditions, there is uncertainty, which must be resolved against Respondent. Accordingly, I reject Respondent's argument that Feliczak's backpay period ended on December 31, 1999.

Additionally, contrary to another argument raised by Respondent, I conclude that the remedy applied by the Board in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968) is not appropriate in the present case. In *Transmarine*, the Board fashioned a remedy for an employer's failure to bargain over the effects of closing a plant, a situation quite unlike the facts here.

Moreover, the Board already has specified the remedy to be applied and the United States Court of Appeals for the Sixth Circuit has enforced the Board's order in all respects relevant here. The present proceeding is not to second–guess the Board's choice of remedy but rather to effectuate it.

In sum, I conclude that the General Counsel has proven all allegations raised by paragraph 1 of the Specification.

Specification Paragraph 2

Paragraph 2 of the Specification alleges that the discriminatees due backpay were listed in Schedule A of the Specification. Respondent admitted this allegation and I so find.

Specification Paragraph 3

Paragraph 3 of the Specification describes the backpay period alleged for each of the listed discriminatees. Respondent's Answer admitted some of these allegations but denied others and set forth alternative dates. At hearing, the General Counsel amended the Specification and these amendments reduced certain of the backpay periods.

Before determining the backpay period of each of the discriminatees, I will consider an issue which concerns many of them. Respondent contends that it has made valid offers of reinstatement which tolled backpay for a number of the discriminatees.

(a) Respondent's putative offers of reinstatement

Specifically, Respondent asserts that it made offers of reinstatement to the following persons: Lange, Gajewski, Smith, Fugere and Belongia. Respondent asserts that backpay should be tolled as of the date it offered reinstatement to these discriminatees because they did not reply to its "offers." Contrary to Respondent, the General Counsel argues that Respondent did not make valid offers of reinstatement.

Respondent attached these purported offers as exhibits to its Answer. Significantly, the word "reinstatement" does not appear even once in any of these documents. Instead, most of them

bear the title "NOTICE OF JOB OPENING." They take the following form:

> Please be advised that FiveCAP, Inc. has a position open for [job title].
>
> To be considered, a written application must be received at the FiveCAP, Inc. . . .office by [time] on [date].

To be valid, an offer of reinstatement must be clear and unequivocal. These documents are clear and unequivocal, but they are clearly and unequivocally *not* offers of reinstatement. Instead, they are clearly and unequivocally notices of job openings.

Nonetheless, Respondent argues that such notices are sufficient to toll backpay because it made these "offers" to comply with an order issued by the United States District Court in a lawsuit the Board filed against Respondent pursuant to Section 10(j) of the Act. Thus, in its post–hearing brief, Respondent asserts that it had "presented undisputed testimony that these notices were sent pursuant to Court Order (Tr. 597; R–15) and that any discriminatees who responded to the notices would have been granted the position which was the subject of the notice."

Respondent's argument is unpersuasive both factually and legally. The District Court did not order Respondent to reinstate any employees but rather to *consider* them on a nondiscriminatory basis for employment in any open positions. Simply considering someone on a nondiscriminatory basis falls far short of making an offer of reinstatement. Complying with an order to consider hiring someone is not the same as complying with an order to reinstate that person.

It may be noted that none of the notices mentions either the District Court's order nor the Section 10(j) proceeding. Even more significantly, none makes an offer of employment.

Moreover, none of the notices gives any indication that Respondent would have "granted the position which was the subject of the notice," and the record does not disclose that Respondent communicated this intention to the discriminatees in any other way. To the contrary, the notices closed with the statement that "To be considered, a written application must be received. . ." Respondent has not explained how, short of mind reading, the discriminatees would know that the words "to be considered" didn't really mean they would be *considered* for a job opening but instead would be given the jobs with no questions asked. (Indeed, it appeared that questions *would* be asked, because the individuals had to file new applications.)

The requirement that an offer of reinstatement be clear and unequivocal means, at the very least, that a discriminatee does not have to be a mind reader. Certainly, a discriminatee does not have a duty to construe a notice in a manner at odds with the plain meaning of its words.

Moreover, considering Respondent's conduct, the discriminatees had no reason to believe or even suspect that Respondent intended a "Notice of Job Opening" to be an offer of reinstatement. To the contrary, Respondent's past unremedied unfair labor practices signaled, if anything, hostility to the Act's requirements.

Respondent has been found guilty of unfair labor practices in two different cases. In one instance, it reinstated a discriminatee, Melissa Kukla, only to discharge her again unlawfully.

Respondent's conduct gave the discriminatees no reason to assume that by "notice of job opening" it really meant "offer of reinstatement."

Moreover, the hostility Respondent displayed towards Kukla after reinstating her causes me to doubt its claim "that any discriminatees who responded to the notices would have been granted the position which was the subject of the notice." Respondent's past conduct leaves little room for such a generous assumption.

Additionally, whether or not Respondent automatically would have employed a discriminatee who answered the notice of job opening, merely creating the *appearance* that it could reject the applicant undermines one remedial purpose. An offer of reinstatement addresses two separate harms caused by an unlawful discharge. Such a discharge, of course, wrongfully deprives an employee of his job, but it also creates fear in the workforce which interferes with other employees' exercise of Section 7 rights. For this reason, among others, an unlawful discharge also violates Section 8(a)(1), which proscribes conduct which interferes with, restrains or coerces employees in the exercise of Section 7 rights.

A clear and unequivocal offer of reinstatement partially remedies the unlawful discharge by restoring the discriminatee's employment. It also partially remedies the Section 8(a)(1) violation by demonstrating to employees that the employer must obey the law which protects their Section 7 rights.

Notifying a discriminatee that she will be "considered" for a job opening if she files a new application certainly does not communicate that the employer recognizes its obligations under the Act and intends to comply with them. It conveys precisely the opposite message: The employer *still* doesn't get the point that it must remedy its unlawful conduct whether it wants to do so or not.

Respondent also offers another argument concerning its requirement that the discriminatee file a new application. It contends that this requirement does not affect the validity of the "notice of job opening" as an "offer of reinstatement" because Respondent had a legitimate business reason for the application requirement. For the reasons discussed below, I find this argument unpersuasive.

Initially, it should be noted that even *without* the application requirement, the "notice of job opening" would not constitute a clear and unequivocal offer of reinstatement. It would still be, as its own caption indicates, a notice of job opening.

Thus, I need not decide whether an otherwise sufficient offer of reinstatement would become invalid if it also included a requirement that the discriminatee submit a job application. Respondent never sent to the discriminatees any "otherwise sufficient" offer of reinstatement. It only sent notices of job openings.

Respondent asserts that it required other employees to submit new job applications periodically and that it appropriately could require the discriminatees to do so, as well. Respondent further argues that it had legitimate business reasons for requiring the discriminatees to submit employment applications: It needed to perform background checks on employees who came into contact with children, and in some instances it needed to be sure that the employee retained a necessary license.

Whatever force this argument might carry in the abstract, in the present context it appears only to be an after–the–fact attempt at justification. If the Respondent had sent any discriminatee an offer of reinstatement with the qualification that the discriminatee must have a necessary license, pass a background check or undergo some other screening required by the government, Respondent's argument could be taken seriously. However, Respondent never did that.

Therefore, I need not reach the issue of whether such a qualified offer of reinstatement would toll backpay. Respondent never made any offer of reinstatement, not even a conditional one.

Just as alchemists once labored in vain to transmute base metals into gold, the Respondent has strained mightily, but unsuccessfully, to change a "notice of job opening" into an offer of reinstatement. Respondent's further assertion, that the purported "offers" are valid notwithstanding the conditions attached, may be likened to an argument that 14 karat gold, rather than 24 karat, is sufficient. Here, though, there is no gold of any kind. Only lead.

In sum, I conclude that the various notices of job openings do not constitute offers of reinstatement, let alone clear and unequivocal offers of reinstatement. They certainly do not toll backpay. *Midwestern Personnel Services*, 346 NLRB No. 58 (February 28, 2006).

(b) Respondent's "failure to mitigate" argument

Respondent also advances a separate argument predicated upon a discriminatee's duty to mitigate backpay by seeking interim employment. Stating that the argument presents an issue which "upon counsel's research, has never been broached by the Board nor a Court," Respondent's brief continues:

> Specifically, it is well established that. . .where and [sic] employee unjustifiably refuses to take new desirable employment such act mitigates the employers [sic] back pay liability. *Phelps–Dodge Corp. v. NLRB*, 313 US 177, 199–200 (1941). General Counsel's position appears to be that there is no duty to respond unless the offer is unconditional. However, such position mixes offers of reinstatement with the somewhat different theory of duty to mitigate. The unique question is whether, where a federal judge enters an affirmative injunction pursuant to a Section 10j [sic] proceeding which orders the employer to – under threat of contempt – notify and consider the discriminatees for all open positions for which they are qualified, on a "nondiscriminatory basis", whether the discriminatees['] refusal to so much as respond to the positions is an "unjustifiable failure to mitigate." FiveCAP maintains that, under such unique circumstance, such refusal is unjustifiable.

It appears that Respondent is contending that the presence of a federal judge looming over Respondent to make sure it played fair and square, adds credence to an otherwise dubious job notice. In other words, the discriminatees could rest assured that Respondent would not do to them what it did to Kukla – reinstating her and then making her job so miserable that she quit – because the federal court was watching.

Whatever credit this argument deserves for originality, it must be rejected as pernicious. Adopting it could create a tempting loophole for respondents seeking to toll backpay without actually offering reinstatement.

Moreover, Respondent had within its own power a surefire way to show discriminatees that it was taking its legal obligations seriously: It could have offered them reinstatement, clearly and unequivocally, just as the law required. Until Respondent makes clear and unequivocal offers of reinstatement, as ordered by the Board and the United States Court of Appeals, it stands in an awkward position to claim that oversight by a District Court has made it mindful of its legal obligations.

Respondent's brief takes issue with the principle that "that there is no duty to respond [to a job offer] unless the offer is unconditional." Respondent appears to argue that such a duty does exist as part of a discriminatee's more general duty to mitigate. Stated another way, Respondent apparently contends that a document which is *not* an unconditional offer of reinstatement for one purpose, tolling backpay, nonetheless constitutes such an offer for another purpose. A discriminatee's failure to pursue such an apparent job opportunity constitutes, in Respondent's opinion, a failure to mitigate, in other words, a failure to make a reasonable job search.

Respondent misapprehends the duty to mitigate. A discriminatee's failure to answer a particular "help wanted" advertisement or to reply to a particular notice of job vacancy does not establish that the discriminatee failed to make reasonable efforts to obtain interim work. Rather, the sufficiency of a discriminatee's efforts to mitigate backpay are determined with respect to the backpay period as a whole and not on isolated portions of the backpay period. *Wright Electric, Inc.*, 334 NLRB No. 129 (August 9, 2001)

Moreover, Respondent bears the burden of proving that a discriminatee's efforts to mitigate are insufficient. A showing that a discriminatee did not respond to one particular job notice on one particular occasion does not carry that burden.

In sum, I reject Respondent's argument that the discriminatees failed to mitigate their backpay. The discriminatees had no duty to apply for new jobs with the same employer that already had discharged them unlawfully and remained unwilling to reinstate them to their former positions. Additionally, Respondent has not carried its burden of proving that, during any discriminatee's entire backpay period, that discriminatee failed to make a reasonable search for work.

(c) Backpay periods

For clarity, I will discuss the allegations in the same order found in Schedule A of the Compliance Specification.

Melissa A. Kukla (Barron)

The Specification initially refers to this discriminatee as Melissa A. Kukla, but in Schedule A, it lists her as "Melissa A. Kukla (Barron)." From the record, it is not clear why Schedule A adds the name "Barron." However, the discriminatee testified that her name is "Kukla" and I will refer to her accordingly.

The Specification alleges that Kukla had two backpay periods: August 1995 to August 22, 1997, and February 19, 1998 to April 2, 1998. By an amendment at hearing, which Respondent did

not oppose, the General Counsel shortened the second alleged backpay period by four days by having it begin on February 23, 1998.

At hearing, the General Counsel also moved to amend the Complaint to allege that Kukla's second backpay period began August 22, 1997 and ended December 1, 1999. Respondent objected to the amendment and I took the matter under advisement. Respondent contends that this amendment, on the first day of the hearing, did not allow sufficient time for it to investigate the matter and prepare a defense.

However, the issue, concerning the ending date of Kukla's backpay period, is not complicated. After the District Court issued the injunction in the Section 10(j) case, Respondent reinstated Kukla and another discriminatee, Jane Myers. The General Counsel contends that after Kukla and Myers returned to work, Respondent did not pay them at the proper rate. More specifically, the government asserts that Respondent paid Kukla and Myers at outdated wage rates which failed to include cost–of–living allowances which Respondent granted other employees in 1995 and 1996.

Additionally, the General Counsel contends, Respondent failed to grant Kukla and Myers a 1997 cost–of–living adjustment which benefitted other employees. The proposed amendment would seek a remedy for Respondent's alleged failure to pay Kukla and Myers the cost–of–living increases.

The issues raised by the proposed amendment – whether Kukla and Myers should have received the cost–of–living adjustments and, if so, how much that would increase their backpay – do not require very much additional investigation, and they concern matters within the particular knowledge of Respondent.

The General Counsel sought the amendment on the first day of the hearing, which lasted two more days. At the close of the hearing, Respondent did not request additional time to investigate the matters raised by the proposed amendment.

In these circumstances, I conclude that allowing the amendment would not prejudice Respondent. Accordingly, the amendment is granted.

The discussion above has characterized the amendment as alleging a *second* backpay period. Because this second period abuts the first, the amendment has the practical effect of creating a single backpay period which began August 1995 and extended to December 1, 1999. I conclude that the General Counsel has established that such a backpay period is appropriate.

Jane E. Myers

The Specification originally alleged that Jane E. Myers had a backpay period extending from August 1995 to August 1997. On the first day of the hearing, the General Counsel sought the amendment discussed above in connection with the backpay periods of Melissa Kukla. That amendment, which I have granted, adds the allegation that Myers had a second backpay period, extending from August 22, 1997 to December 1, 1999.

As in the case of Kukla, for practical purposes the amended Specification alleges that Myers had a single backpay period beginning in August 1995 and extending to December 1, 1999. I conclude that the General Counsel has established that such a backpay period is appropriate.

Amanda Lange

The record establishes that Amanda Lange's backpay period began in August 1995, as alleged. Crediting the testimony of Compliance Officer Patricia Zane, I find that Lange's backpay period ended in August 1997 when Lange received, and declined, a valid offer of reinstatement. For the reasons discussed above, I reject Respondent's argument that it made a valid offer of reinstatement before that date.

Karen A. Gajewski (Sandstedt)

The record indicates that this discriminatee's maiden name was Gajewski and that her married name is Sandstedt. Because the Specification generally refers to her by her maiden name, I will follow that practice to avoid confusion.

The Specification alleges that Gajewski's backpay period began in August 1995 and continues to the present. Respondent's Answer contends that her backpay period should end in August 1996, when "Ms. Sandstedt was provided with notice of an opening in her previous position, but Ms. Sandstedt failed to respond."

For reasons discussed above, I reject Respondent's argument, which strikes me as wholly inconsistent with Board precedent. Not only is there a big difference between a "notice of job opening" and a clear and unequivocal offer of reinstatement, there are important policy reasons for the distinction.

In sum, I conclude that Gajewski's backpay period began in August 1995 and continues.

Verna Fugere

The Specification alleges that Verna Fugere's backpay period began June 1, 1995 and continues at present. Respondent's Answer contends that the backpay period should end in October 1996, "the date in which the Mason County Community Support positions were eliminated." However, Respondent's brief does not elaborate on this argument.

As the community support worker in Mason County, Fugere interviewed individuals seeking services to determine their eligibility. After Fugere's discharge, Respondent did not hire someone to fill that position but instead assigned the duties to other employees.

Respondent's assistant director of community support, Robin Matlock, credibly testified that Respondent still employs community support workers in other counties it serves. The record, including Matlock's testimony, establishes that more than once since Fugere's discharge, Respondent has hired community support workers. I conclude that at all material times, positions substantially equivalent to Fugere's have existed. The record further establishes that Respondent never offered such a position to Fugere.

Respondent cannot avoid the duty to reinstate Fugere simply by eliminating her position. The Board's Order requires Respondent to reinstate Fugere to a substantially equivalent position if her former position were not unavailable. In view of Respondent's failure to offer Fugere reinstatement to such a position, I conclude that her backpay period has not ended.

Respondent also has raised the same "notice of job opening" argument discussed and rejected above. I reject it here as well.

In sum, I conclude that Fugere's backpay period began June 1, 1995 and continues.

Florence Feliczak

For reasons discussed above, I have rejected Respondent's argument that Feliczak's backpay period ended December 31, 1999 because (according to the argument) Respondent could have laid her off lawfully on that date. Additionally, the record does not establish that Respondent ever made Feliczak a valid offer of reinstatement.

Accordingly, I conclude that Feliczak's backpay period began April 9, 1997 and continues.

Dale R. Smith

The record establishes, and I find, that Dale R. Smith's backpay period began April 28, 1995. The parties disagree about the ending date. The Compliance Specification alleges that the backpay period continues. Respondent argues that reductions in federal funds compel the conclusion that Respondent would have eliminated Smith's position in October 1997.

Smith worked as an inspector in Respondent's weatherization department. He examined homes to evaluate the need for weatherproofing and inspected them again to make sure the work had been done properly. Respondent asserts that it paid Smith's wages entirely from funds provided by the United States Department of Energy ("DOE"), and that these funds dwindled. Respondent's brief states:

> Specifically, DOE funds FiveCAP by providing an allotted sum of funds and requires a corresponding number of units [Tr. 394]. When funding is decreased, there is a reduction in the number of units, and thus a decrease in work available to keep inspectors and crews employed [Tr. 394]. If there is not sufficient and steady work, contractors must be used in that contractors work for other clients and on other projects.
>
> Here the testimony is that an inspection takes 3–4 hours, and there is an additional several hours to do paperwork (Tr. 511) for a total of 6–7 hours. (Tr. 579.) Mr. Smith contests this in that he does not have knowledge as to how long an inspection currently takes. (Tr. 704)
>
> However, there are additional costs of internal crews and inspectors, which necessitate additional funding be provided sufficient to keep employees working on a full–time basis – which costs are not incurred by the use of contractors. These include costs associated with fringe benefits and provision of workers' compensation, which is expensive. (Tr. 421, 541) In addition, the funding source must separately provide funding for vehicles and equipment

> necessary to conduct inspections and to maintain an internal full–time crew and inspectors (such as equipment and vehicles). (Tr. 541, 524)

Respondent's argument must be considered in light of its past conduct. To retaliate against an employee for her union activities and her appearance in a Board proceeding, the Respondent "engaged in a pattern of misconduct designed to harass [the employee] or make her working conditions so unpleasant that she would quit. . ." *FiveCAP, Inc.*, 332 NLRB 943, 945 (2000). The Board therefore concluded that Respondent had constructively discharged the employee in violation of Section 8(a)(3) and (4) of the Act.

A constructive discharge is a notably circuitous method of retaliation. Here, it entailed not merely one straightforward act but a *pattern* of misconduct, suggesting a persistent and calculated intent. More than that, a constructive discharge inherently involves an element of subterfuge. If Respondent hadn't wanted to conceal its intent, it would simply have discharged the employee rather than harassing her until she quit.

In view of this past conduct, which demonstrates both Respondent's tenacious hostility to the Act and its willingness to be disingenuous, I bring a certain skepticism to its claim that reductions in federal funding forced Respondent to eliminate Smith's position and subcontract the work. Before accepting Respondent's argument that it acted because of factors outside its control, I will look for evidence that the factors were, indeed, beyond Respondent's control.

Respondent points to figures indicating that the amount of federal funding decreased, but those figures alone hardly tell the whole story. The record leaves in doubt how much funding Respondent *sought.* If the evidence established that the Department of Energy had denied Respondent's request for enough money to fund Smith's position, Respondent's argument would be a little more persuasive. However, Respondent hasn't shown that it tried to obtain such funding.

Absent proof, I will not simply presume that after discharging Smith unlawfully, Respondent then actively sought funding to underwrite his reinstatement. Such an endeavor would be out of character for a respondent already shown to be capable of artifice. Stated another way, Respondent, the wrongdoer, is not entitled to the benefit of the doubt.

The fact that a respondent has subcontracted out the work of an unlawfully discharged employee does not relieve the respondent of its obligation to reinstate the employee. See *Cassis Management Corp.*, 324 NLRB 324, fn. 3 (1997). Here, the Respondent has failed to prove that it would have subcontracted Smith's work even if it had not unlawfully discharged him.

The record also fails to establish that quota reductions beyond Respondent's control compelled Respondent to subcontract the weatherization work. Accordingly, I conclude that Respondent's obligation to reinstate Smith continues, and so does Smith's backpay period.

Tom Belongia

The Specification alleges that Tom Belongia's backpay period began June 7, 1995 and continues to the present. Respondent's Answer raises two arguments which have been discussed above. It asserts that Belongia's "backpay period should terminate in August, 1996, the date, Mr.

Belongia was notified of an opening in his previous position, but Mr. Belongia never responded in that he had obtained other employment. . .” The Answer further states that, in the alternative, that “the backpay period should terminate effective October, 1997 in that the Weatherization Crews and Inspectors positions were eliminated due to Federal and State funding reductions and decreases in quotas.”

For the reasons discussed above, I have concluded that the notices of job openings which Respondent sent to the discriminatees were not valid offers of reinstatement. Therefore, I reject the argument that Belongia’s backpay period ended in August 1996.

For the reasons discussed above in connection with Dale Smith, I have rejected the argument that federal funding cutbacks and quota reductions forced Respondent to eliminate the weatherization positions.

In sum, I conclude that Belongia’s backpay period began June 7, 1995 and continues.

David Monton

David Monton’s backpay period began August 17, 1995. The Respondent asserts that it made an offer of reinstatement which ended the backpay period on January 26, 1996. At hearing, the General Counsel amended the Specification to allege that Monton’s backpay period ended on this date.

The amendment eliminated any dispute concerning the duration of Monton’s backpay period. Accordingly, I conclude that Monton’s backpay period began August 17, 1995 and ended January 26, 1996.

Art Burkel

Art Burkel’s backpay period began August 17, 1995. Respondent contends that the backpay period ended January 25, 1996 and, at hearing, the General Counsel amended the Specification to allege that the backpay period ended on that date. Accordingly, I conclude that Burkel’s backpay period began August 17, 1995 and ended January 26, 1996.

Bruce Kent

Bruce Kent’s backpay period began September 2, 1995. The Compliance Specification originally alleged that Kent’s backpay period continued to the present. Respondent’s Answer asserted that the backpay period embed Anot later than December 1, 1999.”

At hearing, the General Counsel amended the Specification to alleged that Kent’s backpay period ended April 3, 1996, which is consistent with the record. Accordingly, I conclude that Kent’s backpay period began September 2, 1995 and ended April 3, 1996.

Specification Paragraph 4(a)

Paragraph 4(a) of the Specification alleges that an appropriate measure of gross backpay can be obtained by multiplying the weekly salary of each discriminatee by the number of weeks in each calendar quarter during the backpay period. In its Answer, Respondent addressed this allegation as follows:

> FiveCAP, Inc. admits that gross backpay can be obtained by utilizing the weekly salary multiplied by the number of actual working weeks within the year. However, FiveCAP, Inc. avers that the Head Start positions and other positions do not work every week during a calendar quarter. FiveCAP, Inc. denies as untrue the remaining allegations of fact or conclusions of fact and/or law set forth in paragraph 4(a) not expressly admitted herein.

Although the Answer asserted that "Head Start positions and other positions do not work every week during a calendar quarter," the Answer did not point to any particular instance in which the Specification incorrectly had included a week when the employees were not working. The Answer did not provide any information concerning when Head Start personnel did or did not work, and thus did not offer any alternative to the figures in the Specification.

Section 102.56(b) of the Board's Rules and Regulations defines what must be included in an answer to a compliance specification. It states, in pertinent part, as follows:

> As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

Section 102.56(c) provides, in part, that:

> If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

The dates on which Head Start personnel did or did not work constitute matters within the knowledge of Respondent. Accordingly, Respondent had the duty to set forth such dates in its Answer. Because it failed to do so, I will deem admitted the allegations in Specification paragraph 4(a).

Specification Paragraph 4(b)

Initially, Specification paragraph 4(b) alleged that each discriminatee would have received a 4% per year cost–of–living allowance ("COLA") during the backpay period. At hearing, the General

Counsel amended the Specification to allege as follows:

> For the fiscal year which ended October 31, 1995 the COLA should be 2.94 percent.
>
> For the Fiscal year 1995–1996 (which ended October 31, 1996) the COLA should be 3 percent.
>
> For the fiscal year 1998–1999 (which ended October 31, 1999) the COLA should be 1.5 percent.
>
> For the fiscal year ending October 31, 2001 the COLA should be 3.5 percent.
>
> For the fiscal year ending October 31, 2002, the COLA should be 2.6 percent.

The General Counsel explained that the 4 percent cost–of–living allowance alleged in the initial Specification "was an approximation made by the Region because of the absence of records from the Respondent showing the COLA's and the absence of any evidence to establish precisely what the COLA's are. Over the last few days, including this morning, there has been further evidence."

For other years, the amendments at hearing left unchanged the allegation that all discriminatees would have received a 4 percent increase in the cost–of–living allowance.

Respondent denied that all employees received cost–of–living allowances. Its Answer stated that only its Head Start employees received such allowances.

Respondent's brief identifies the discriminatees who, it contends, were not Head Start personnel and, it contends, are not entitled to any cost–of–living allowance amount: "Messrs. Monton, Burkel, Belongia and Smith DID NOT receive either COLA's or annual wage increases." (Emphasis in original)

Respondent's brief also lists the discriminatees who worked in the Head Start program and who, Respondent concedes, would have received cost–of–living allowances during the backpay periods:

> The FiveCAP Head Start employees fully funded through [Department of Health and Human Services] here at issue are Ms. Kukla, Ms. Meyers [sic], Ms. Lange, Ms. Gajewski (Sandstedt) and Mr. Kent. As such, there is no question that these employees are entitled to the annual COLA increases as set by HHS. . .

Further, Respondent's brief describes a third category: Employees who, Respondent asserts, are entitled to partial cost–of–living allowances. Respondent paid their wages partly, but not exclusively, from Head Start grants. Accordingly, Respondent asserts, the backpay of discriminatees Verna Fugere and Florence Feliczak should include some amounts attributable to cost–of–living allowances, but not as much as Kukla, Myers, Lange, Gajewski and Kent.

Apart from the question of entitlement to cost–of–living allowances, Respondent also disputes some of the amounts alleged in the Specification. Its Answer asserts that the Head Start employees received the following cost–of–living allowance increases:

Fiscal Year	Increase		Fiscal Year	Increase
1998–1999	1.5 percent		2001–2002	2.6 percent
1999–2000	2.6 percent		2002–2003	1.5 percent
2000–2001	3.5 percent			

The Specification, as amended, and Respondent's Answer agree with respect to some of the COLA increases for Head Start personnel. Specifically, both the General Counsel and Respondent agree that Head Start personnel received the following increases in their cost–of–living allowances:

Fiscal Year	Increase		Fiscal Year	Increase
1994–1995	2.94 percent		2000–2001	3.5 percent
1998–1999	1.5 percent		2001–2002	2.6 percent

In view of the agreement of the parties, I find that Respondent granted to its Head Start personnel the cost–of–living increases summarized above. To avoid confusion, I will restate these findings in the following way: When the Respondent's 1994–1995 fiscal year began on November 1, 1994, the cost–of–living allowance provided to Respondent's Head Start personnel increased their wage rates by 2.94 percent over the wage rates applied to their work during the fiscal year which ended October 31, 1994.

However, it should be observed that the Compliance Specification does not apply the cost–of–living adjustment to wages beginning on November 1 but instead increases the wage rate at the beginning of the next calendar quarter, that is, on January 1. The Respondent has not specifically objected to this practice, which I will follow. Thus, if a hypothetical employee made $10.00 per hour in the 1993–1994 fiscal year, the 2.94 percent COLA for 1994–1995 would increase the employee's hourly rate by 29 cents, making it $10.29 beginning January 1, 1995.

Although the General Counsel amended the Specification at hearing to change the cost–of–living allowances allegations for certain of the fiscal years, the amendments leave unchanged certain other allegations in Specification paragraph 4(b). These allegations are that all discriminatees would have received 4 percent COLA increases during the 1996–1997, 1997–1998, 1999–2000, 2002–2003, 2003–2004 and 2004–2005 fiscal years.

Respondent's Answer denied that any of its employees except those assigned to the Head Start program received a cost–of–living allowance. I conclude that this denial suffices to satisfy the specificity requirements of Section 102.56(b) *with respect to the non–Head Start personnel*. Although that rule requires Respondent to "furnish the appropriate supporting figures" when Respondent disagrees with those in the Specification, Respondent's denial does, in effect, furnish such figures. The denial is equivalent to stating that the non–Head Start personnel received a zero percent increase of a zero cost–of–living allowance, which is a specific amount.

However, because Respondent has admitted that the Head Start personnel did receive cost–of–living allowances, if it wished to contest the 4 percent increase alleged in the Compliance

Specification it had a duty to include "supporting figures" in its Answer or, at the least, to provide an acceptable explanation as to why the Answer did not provide such figures.

At a minimum, the "supporting figures" required by Section 102.56(b) would include the amount (percent of previous wage rate) of the cost–of–living adjustment for each year. Respondent's Answer did not provide any reason why it would not possess the kind of information every employer must possess, namely, the wage rates paid to its employees. Absent such a reason, I will presume that Respondent did know the percentage by which it increased the employees' wage rates.

It cannot be doubted that Section 102.56(b) requires Respondent's Answer to include this information, which is essential to placing in issue the figures alleged by the General Counsel. (Indeed, in certain instances when Respondent's Answer did set forth the COLA percentages, the General Counsel amended the Specification to conform to the figures in Respondent's Answer.)

Nonetheless, Respondent's Answer does not provide supporting figures for the following fiscal years: 1995–1996, 1996–1997, 1997–1998, 1999–2000, 2003–2004, and 2004–2005.

During the hearing, Respondent sought to elicit testimony and introduce documents concerning the COLA increases given to its Head Start employees during some of these fiscal years. The General Counsel objected, citing Section 102.56(c), which provides in part that if a respondent's answer fails to deny any allegation in the manner prescribed by Section 102.56(b), and the failure is not adequately explained, the allegation shall be deemed true and the respondent precluded from introducing any evidence controverting the allegation.

Respondent countered that it could not find certain records when it was preparing its Answer, but did locate some documentation later, while looking for records sought by the General Counsel's subpoena. Respondent moved, on the record, to amend its Answer.

Over the General Counsel's objection, I received into evidence Respondent's Exhibits 11, 12, and 13. Additionally, I allowed Respondent to adduce testimony related to these records, but subject to the General Counsel's motion to strike. Also, I took under advisement Respondent's motion to amend its Answer and requested counsel to address these matters in their briefs.

In its brief, Respondent argues that Section 102.23 of the Board's Rules gives the judge authority to allow it to amend its Answer. However, this provision pertains to a respondent's answer to an unfair labor practice complaint, rather than to a compliance specification. Rather, Section 102.56(e) applies here. It states that "Following the amendment of the specification by the Regional Director, any respondent affected by the amendment may amend its answer thereto."

This provision permits Respondent to amend its Answer to reply to new allegations raised by amendment to the compliance specification. Thus, Respondent does have the right to amend its Answer with respect to the General Counsel's oral amendments during the hearing. For example, Respondent clearly has the right, under Section 102.56(e), to amend its Answer with respect to the cost–of–living allowance increase for the 1995–1996 fiscal year, because the General Counsel's amendment affected that allegation. (Respondent may also, of course, amend its Answer with

respect to the remaining new allegations in Specification paragraph 4(b), but on those matters, the parties agree.)

Read literally, Section 102.56(e) does not give a respondent the right to amend its answer with respect to allegations which have not been added by amendment to the compliance specification. However, Board precedent clearly accords a respondent the right to amend its answer *before hearing* even if the specification has not been amended. See, e.g., *Consolidated Delivery & Logistics, Inc.*, 344 NLRB No. 67, slip op. at 2 (April 28, 2005) ("a respondent in a compliance proceeding may properly cure defects in its answer before a hearing by an amended answer or a response to a Notice to Show Cause") citing *Daufuskie Island Club & Resort, Inc.*, 341 NLRB No. 81, slip op. at 2 (2004). In *Coronet Foods, Inc.*, 316 NLRB 700 (1995), the Board stated,in part:

> The General Counsel argues that because the backpay specification was not amended, the Respondent could not amend its answer. We disagree. The Board consistently has interpreted Section 102.121 to provide that the Board's Rules are to be liberally construed, and has held that nothing in the Rules precludes the filing of an amended answer, even in the absence of an amended specification.

316 NLRB at 701. The *Coronet Foods, Inc.* decision concerned a respondent's attempt to amend its answer before the hearing. Thus, it does not precisely address the situation presented here. Section 102.121 of the Board's Rules, cited in *Coronet Foods, Inc.*, states:

> The rules and regulations in this part shall be liberally construed to effectuate the purposes and provisions of the Act.

It appears that the words "in this part" refer to Subpart B of the Board's Rules. That subpart includes the provisions applicable to compliance proceedings. But "construe" does not mean "rewrite," and the very general language of Section 102.121 should not supersede the specific mandate of Section 102.56(c) that a respondent whose answer fails to comply with Section 102.56(b) "shall be precluded from introducing any evidence controverting the allegation."

Allowing a respondent to amend its answer at hearing, other than to address an amendment to the compliance specification, either would be meaningless or would undermine the prohibition in Section 102.56(c). If the judge allowed the amendment and then precluded the respondent from presenting evidence about it, then the amendment would be a waste of time. On the other hand, the judge could permit the respondent to present such evidence only by disregarding the prohibition in Section 102.56(c).

Accordingly, with one exception, I deny Respondent's motion to amend its Answer during the hearing. The exception pertains to fiscal year 1995–1996. As discussed above, the General Counsel did amend the Specification at hearing with respect to the cost–of–living allowances during this fiscal year. Respondent has the right to answer this amendment and to present evidence addressing the issues it raises.

Respondent's Exhibits 11, 12 and 13, received into evidence over the General Counsel's objection, do not pertain to the 1995–1996 fiscal year. Therefore, I conclude that I erred in receiving them, and will not rely on these exhibits for any purpose.

With respect to the General Counsel's motion to strike parts of the testimony of Respondent's executive director, although I do not order the testimony to be stricken physically from the record, I will disregard it, except as it may pertain to the 1995–1996 fiscal year.

There is no reason to doubt the representation of Respondent's counsel that Respondent only located certain documents, including Respondent's Exhibits 11, 12 and 13, after it had filed its Answer. However, Section 102.56 does not focus on what a respondent represents during the hearing; rather, the rule sets standards for the content of a respondent's answer.

Respondent's Answer did not indicate that any needed documents were missing or inaccessible and it also did not provide any explanation, adequate or otherwise, for its failure to plead alternative figures. In such circumstances, Rule 102.56(c) provides that the allegation *shall* be deemed admitted to be true.

It does concern me that a strict application of the Rule may lead to an arbitrary result. Compliance Officer Patricia Zane testified as follows concerning how she reached the conclusion that the cost–of–living allowance increases should be 4 percent:

> **A:** At the time of the back pay computation, it was my understanding from the discriminatees that they got COLA increases. However, it was uncertain exactly how much the COLA's were and when they were given. I knew that they got COLA's. I didn't know exact amounts. I didn't know how the process worked. I didn't have payroll records.
> **Q:** Okay.
> **A**: So I made a reasonable assumption that they would have gotten approximately 4%.

From this testimony, I gather that the compliance officer essentially made up a number that she considered reasonable. Even though this figure is arbitrary, the compliance officer had no alternative because Respondent had not provided payroll records. Respondent could have pleaded an alternative figure in its Answer or at least explained why it could not find its own records. It did neither.

Moreover, the "shall be precluded" language of Section 102.56(c) leaves no room for discretion. Accordingly, I find that the discriminatees who were employed in Respondent's Head Start program (Kukla, Myers, Lange, Gajewski, Kent, Fugere and Feliczak) should receive 4 percent increases in their cost–of–living allowances, as alleged in the Specification, for fiscal years 1996–1997, 1997–1998, 2003–2004, and 2004–2005.

These findings do not tie up all the "loose ends." The cost–of–living increase for the 1999–2000 fiscal year must still be determined. Respondent's Answer does allege an amount, 2.6 percent. However, for this particular fiscal year, the General Counsel has not amended the Specification to agree with the Respondent.

If Respondent's Answer satisfies the requirements of Section 102.56(b), then the General Counsel bears the burden of proving that the affected discriminatees would have received a 4 percent COLA if they had retained their jobs. However, if Respondent's Answer fails to comply

with the Rule, then the government's burden becomes minimal. Indeed, Section 102.56(c) provides that the Board may then find the allegation to be true "without the taking of evidence supporting such allegation. . ." This lowers the bar enough to turn a pole vault into a stroll.

As discussed above, the COLA amount is within Respondent's knowledge, and for such matters the Rule provides that "if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the *appropriate supporting figures*." Section 102.56(b) (italics added).

When the issue concerns the computation of gross backpay, the "supporting figures" are the numbers needed to make that calculation, such as hours of work per week, weeks of work per quarter, hourly wage rates, and, when necessary, the relevant cost–of–living adjustments. It's more difficult to define the term "supporting figures" when the issue concerns the correct cost–of–living adjustment. Unlike gross backpay, the COLA is not a product of any other numbers.

In *Donaldson Bros. Ready Mix, Inc.*, 345 NLRB No. 86 (September 30, 2005), the Board denied the General Counsel's Motion for Partial Summary Judgment, finding instead "that the Respondent's answers and opposition brief satisfy the requirements of Section 102.56 because they sufficiently state the basis for the Respondent's disagreement with the General Counsel's figures, set forth alternative premises, and furnish appropriate supporting figures."

The Board thus appears to gauge the sufficiency of a respondent's answer by how well it achieves important purposes of the Rule. Specifically, the Rule limits the compliance proceeding to concrete, well–defined issues which can be proven or disproven with actual evidence and, conversely, screens out hypothetical or speculative matters not originating in the relevant facts. The Rule tests the legitimacy of an argument by requiring a respondent to identify all the elements needed to support it. Unlike a poker game, all cards are on the table in a compliance proceeding and a respondent does not enjoy the opportunity to bluff.

Respondent's Answer seeks to place in issue the amount of the 1999–2000 COLA by alleging it to be 2.6 percent rather than 4 percent. The Answer also explains why Respondent cannot be more specific about any formula used to set the COLA percentage. It states that "the cost of living increases for Head Start employees are set, on an annual basis, by the Funding Units." In other words, the government agencies which provide money for the Head Start program tell the Respondent how large the cost–of–living adjustment will be.

Respondent's Answer both raises an actual issue material to the proceeding and identifies the evidence required to resolve it. Therefore, I conclude that this portion of the Answer satisfies Rule 102.56. Accordingly, the strictures of paragraph (c) of this rule do not apply and the General Counsel will not simply be "deemed" to have proven the allegation.

Clearly, the government bears the burden of proving the amount of the cost–of–living increase. It is true that in backpay proceedings, the sole burden on the General Counsel is to show the gross amounts of backpay due. *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 544 (1943). However, applying the correct cost–of–living adjustment is a necessary intermediate step in computing gross backpay.

The government has not established the correct 1999–2000 COLA to be 4 percent. To the contrary, Compliance Officer Zane's testimony indicates that the absence of evidence necessitated making an arbitrary assumption about the COLA amount. Moreover, no evidence in the record supports a finding that the COLA amount for 1999–2000 should be 4 percent.

Respondent's Answer alleges a 2.6 percent cost–of–living adjustment for this fiscal year. Relying on this admission, I find that the wage rate of the affected discriminatees should be increased by 2.6 percent for the 1999–2000 fiscal year.

With respect to the 1995–1996 fiscal year, the General Counsel amended the Specification at hearing to allege that the affected discriminatees are entitled to a 3 percent increase in their cost–of–living allowances. Respondent had an opportunity to answer this amendment with the specificity required by Section 102.56. However, Respondent has not provided alternative figures and has not otherwise shown the 3 percent figure to be incorrect. Therefore, I shall deem Respondent to have admitted that the discriminatees who were employed in Respondent's Head Start program should receive a 3 percent increase in their cost–of–living allowances for fiscal year 1995–1996.

Respondent denied that four discriminatees had received cost–of–living allowances. These employees (Monton, Burkel, Belongia and Smith) had not worked in the Head Start portion of Respondent's operation.

The record does not establish that any of these employees had received cost–of–living allowances. Because the discrimination against them didn't cause them to lose any such allowances, I conclude that their backpay should not include such amounts.

To summarize, I conclude that the following cost–of–living adjustments should be made to the wage rates of all discriminatees except Monton, Burkel, Belongia and Smith:

1994–1995	2.94 percent		2000–2001	3.5 percent
1995–1996	3.0 percent		2001–2002	2.6 percent
1996–1997	4.0 percent		2002–2003	4.0 percent
1997–1998	4.0 percent		2003–2004	4.0 percent
1998–1999	1.5 percent		2004–2005	4.0 percent
1999–2000	2.6 percent			

Specification Paragraph 4(c)

Paragraph 4(c) of the Specification alleges that gross backpay for each discriminatee is reflected in Schedules B–1 through B–11, appended to the Specification. Respondent's Answer stated that "FiveCAP, Inc. denies as untrue the allegation that interim earnings have been appropriately calculated in the attached schedules." The Answer sets forth specific figures with respect to the individual discriminatees.

Respondent contends that certain collective–bargaining agreements affect the backpay computations. Respondent also argues that the Specification incorrectly computers vacation pay in

certain instances. It is appropriate to consider these arguments before beginning the gross backpay calculations.

Effect of Collective Bargaining Agreements

Respondent and the Union entered into a collective–bargaining agreement effective from December 1, 1999 through November 30, 2002. Respondent contends that the wage rates specified in this contract should be used to calculate backpay, beginning December 1, 1999, when the agreement went into effect.

The starting wage rates for various employee classifications appear in Article XIII, Section 8 of the agreement. This section also includes the following language:

> Employees receiving a wage in excess of the Starting Wage set forth above will not have their wages reduced as a result of signing this agreement and, if otherwise eligible, shall be eligible for Cost of Living and Merit Increases.

The Respondent and the Union entered into a second collective bargaining agreement, effective from December 1, 2002 through November 30, 2005. Article XIII, Section 8 of the contract, which specifies the starting wage rates, also includes the language quoted above.

Accordingly, I conclude that the collective bargaining agreement does not reduce any of the wage rates used to calculate the backpay, as set forth in the schedules appended to the Specification. Similarly, the contract does not limit the discriminatees' cost–of–living adjustments.

Respondent's Vacation Pay Arguments

Respondent raises certain arguments concerning the determination of vacation pay. First, I will consider Respondent's arguments as they pertain to discriminatees Kukla, Lange, Gajewski and Myers, who worked in Respondent's Head Start program.

Kukla, Lange, Gajewski and Myers

Any attempt to summarize Respondent's arguments might result in misstatement, so it is better to quote Respondent verbatim. Respondent's brief states as follows:

> There is no question that Head Start employees at FiveCAP work only a portion of a full working year (late August to late May or 9/12 of a year, and are laid off over Winter Break). The witnesses for both General Counsel and FiveCAP testified that Head Start employees[‘] vacation at FiveCAP is prorated based upon the fact that they do not work a full year. (Tr. 656 (Trucks), 175 (Kukla), 210 (Meyers [sic])). As such, Head Start employees, including Ms. Kukla, Lange, Gajewski and Meyers [sic], are not entitled to ten working days of vacation but, rather, 7.5 working days of vacation (i.e. 9/12 x 10).
>
> Further, it is true that Head Start employees, unlike other non–Head Start employees at FiveCAP, are not permitted to take this vacation during the school year. (Tr. 657) As such, Head Start employees were (until December 1999–the date in which the first collective bargaining agreement was executed) permitted by FiveCAP to take the vacation over the two

week Winter Break period[15] in which Head Start employees are on layoff status, with the remaining time taken at the end of the school year before the employee commences the summer break layoff (Tr. 133–34, 165, 167, 178–72 [sic], 209–210). As such, the specification prior to 1999 properly gives 13 weeks paid time for the fourth quarter (to include Winter Break, where employees would use vacation), but improperly adds 2 weeks vacation to the end of the third quarter.

After 1999, the Head Start employees were permitted, pursuant to the terms of the collective bargaining agreement, to take vacation at the end of the school year, BUT those employees were not permitted to use vacation to offset the layoff over the Winter Break, and, instead, were on layoff status. (Tr. 210). As such, after 1999, the specification properly reflects 7 weeks for the first and third quarter. However, the specification should reflect 11 weeks for the fourth quarter (to reflect the two week Winter Break layoff). General Counsel included in his specification BOTH a ten working day vacation benefit for Head Start employees at the end of the school year in addition to a full two paid weeks benefit for the Winter Break in which the Head Start employees would be on layoff status.[16] (Tr. 133–134.) This is in error.

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[15] This period would also include four holidays which are not charged as vacation, as such, six vacation days would be expended by the employee.

[16] A full 13 weeks were included in the first quarter of the specification, as were two additional weeks for vacation (a total of 7 weeks).

(Respondent's Brief, pages 18–19, emphasis in original)

Respondent's counsel made a somewhat different statement in an October 9, 2003 letter to the Board's supervisory compliance officer in Region 7. Numbered paragraph 6 of this letter includes a table with columns headed "Eligible Wage and Vacation prior to termination" and "Eligible Wage and Vacation on rehire." In this table, Respondent states that discriminatees Myers and Kukla each had 10 days vacation prior to termination and 10 days vacation on rehire.

Respondent's counsel's letter thus appears to contradict Respondent's brief, which argued that these employees "are not entitled to ten working days of vacation but, rather, 7.5 working days of vacation. . ." For two reasons, I credit the letter rather than the brief.

Most obviously, the brief is not evidence. However, the October 9, 2003 letter is in evidence as General Counsel's Exhibit 2. Moreover, Respondent's attorney is its agent – that, essentially, is what "attorney" means – and the statements in this letter are attributable to Respondent. They constitute admissions.

These reasons so strongly favor the letter over the brief that it isn't necessary to ask whether an estoppel principle has any application. However, it may be noted that Respondent's letter provided information the compliance officer had requested to compute backpay, and the compliance officer used the Respondent's admissions for that purpose.

Respondent's October 9, 2003 letter appears clear on its face: Myers and Kukla are entitled to 10 days vacation each year. To the extent that there are uncertainties, they must be resolved in favor of the discriminatees rather than Respondent.

Rejecting Respondent's argument, I conclude that the credibly evidence establishes that the Specification properly pleads the amount of vacation time for the discriminatees who had worked in Respondent's Head Start program.

Melissa Kukla (Specification Schedule B–1)

Respondent's Answer alleges that Kukla would have been compensated at a wage rate of $8.80 per hour during 1995–1996, and at the rate of $9.10 per hour in 1997 and 1998. It appears that Respondent's figures differ from those in the Specification for two reasons.

First, the General Counsel argues that Kukla would have received a 30 cents per hour wage increase beginning September 1, 1995 because she had obtained a needed child development certification. Respondent concedes this point in its brief: "FiveCAP does not contest General Counsel's position that, due to Ms. Kukla's CDA certification, her wage rate was $9.10 per hour. . ."

Accordingly, I find that Kukla's wage rate increased to $9.10 per hour as of September 1, 1995. Before that date, her wage rate was $8.80 per hour.

Second, when the compliance officer made the calculations which resulted in Schedule B–1 of the Specification, she assumed that Kukla and other employees would have received a 4 percent cost–of–living increase:

> **Q:** Now I want to direct your attention then to the first quarter of '96 and there Ms. Kukla's wage rate goes from $9.10 to $9.46 an hour. Would you explain why does the rate change there?
> **A:** I gave her a 4% COLA increase.

However, that estimate proved too high. At hearing, the General Counsel amended the Specification to allege that the COLA for the 1995–1996 fiscal year was 3 percent, and Respondent does not dispute this figure. Accordingly, I find that the appropriate wage rate for Kukla during the first 3 quarters of 1996 is $9.37 per hour.

For the reasons discussed above, I have concluded that the government has proven that the discriminatees who received COLA adjustments would have gotten a 4 percent increase for the 1996–1997 fiscal year. Increasing Kukla's $9.37 wage rate by 4 percent, I find that the appropriate wage rate to apply during the fourth quarter of 1996 and the first two quarters of 1997 is $9.74 per hour.

Additionally, for reasons discussed above, I have concluded that the discriminatees who received COLA increases are entitled to a 4 percent increase for the 1997–1998 fiscal year. Increasing Kukla's $9.74 wage by this amount results in a wage rate of $10.12 per hour. I conclude this is Kukla's correct wage rate for the first two quarters of 1998.

Substituting these wage rates for those in Schedule B–1 leads to the following amounts of gross backpay:

Year / Quarters	No. of Weeks	Regular Hours	Wage Rate	Gross Backpay
1995 / 3	7	35	$ 8.80	$ 2,156.00
1995 / 4	13	35	$ 9.10	$ 4,140.50
1996 / 1	13	35	$ 9.37	$ 4,263.35
1996 / 2	11	35	$ 9.37	$ 3,607.45
1996 / 3	7	35	$ 9.37	$ 2,295.65
1996 / 4	13	35	$ 9.74	$ 4,431.70
1997 / 1	13	35	$ 9.74	$ 4,431.70
1997 / 2	11	35	$ 9.74	$ 3,749.90
1998 / 1	6	35	$10.12	$ 2,125.20
1998 / 2	1	35	$10.12	$ 354.20
			TOTAL:	**$ 31,555.65**

Jane Myers (Specification Schedule B–2)

Jane Myers credibly testify that Respondent employed her as a "home start" teacher in May 1995 at a rate of $8.29 an hour. Although Respondent's Answer denied that Myers earned this wage rate, payroll records corroborated Myers' testimony, which I credit For example, attached to her January 31, 1995 paycheck is a stub showing that she received pay of $464.24 for 56 hours of work, which reflects an hourly rate of $8.29.

Respondent uses the $8.29 figure in its brief and it appears Respondent no longer disputes that this is the correct pay rate for Myers during the third quarter of 1995. I so find.

Accordingly, I conclude Specification Schedule B–2 correctly shows Myers' gross backpay for the third and fourth quarters of 1995.

However, the subsequent figures are not correct because the calculation assumes a 4 percent COLA adjustment. The correct COLA increase for the 1995–1996 fiscal year is 3 percent. Accordingly, I find that the correct hourly wage for Myers during this fiscal year is $8.53 rather than $8.62.

Specification Schedule B–2 does use the appropriate COLA adjustment, 4 percent, for the 1996–1997 fiscal year. However, the calculation remains inaccurate because it assumes that Myers' wage rate had been $8.62 rather than $8.53. Increasing the $8.53 rate by 4 percent results in an hourly wage of 8.87. I find that this is the appropriate rate for the 1996–1997 fiscal year.

After making the corrections in Myers' hourly rates, Schedule B–2 would indicate the following gross backpay:

Year / Quarter	No. of Weeks	Regular Hours	Wage Rate	Gross Backpay
1995 / 3	7	35	$ 8.29	$ 2,031.05
1995 / 4	13	35	$ 8.29	$ 3,771.95

Year / Quarter	No. of Weeks	Regular Hours	Wage Rate	Gross Backpay
1996 / 1	13	35	$ 8.53	$ 3,881.15
1996 / 2	11	35	$ 8.53	$ 3,284.05
1996 / 3	7	35	$ 8.53	$ 2,089.85
1996 / 4	13	35	$ 8.53	$ 3,881.15
1997 / 1	13	35	$ 8.87	$ 4,035.85
1997 / 2	11	35	$ 8.87	$ 3,414.95
1997 / 3	7	35	$ 8.87	$ 2,173.15
			TOTAL :	**$28,563.15**

Amanda Lange (Specification Schedule B–3)

At hearing, the General Counsel amended the Specification to allege that Lange's wage rate in the third quarter of 1995 would have been $7.98 rather than the $7.68 rate shown in Schedule B–3 of the Specification. As discussed with respect to Kukla, it was Respondent's established policy to grant a 30 cents per hour wage increase after a Head Start employee obtained a Child Development Associate certificate. Lange achieved such certification in June 1995.

In its brief, Respondent stated that "FiveCAP does not contest General Counsel's position that. . .Ms. Lange's wage rate was $7.98 per hour." I find that Lange was entitled to the $7.98 wage rate for the third quarter of 1995.

Additionally, the $7.98 figure provides the base for calculating the cost–of–living adjustment. In 1995–1996, this COLA was 3 percent, rather than the 4 percent figure initially alleged in the Specification. Accordingly, Lange's correct wage rate for the first quarter of 1996 may be obtained by taking 3 percent of her existing $7.98 wage rate and adding it to that amount. Thus, her wage rate beginning January 1, 1996 was $8.21 per hour.

Because of the 4 percent COLA applicable to 1996–1997, Lange's wage rate increased from $8.21 to $8.53 per hour in the first quarter of 1997. Applying the new figures to Schedule B–3 results in the following figures for gross backpay:

Year / Quarter	No. of Weeks	Regular Hours	Wage Rate	Gross Backpay
1995 / 3	7	35	$ 7.98	$ 1,955.10
1995 / 4	13	35	$ 7.98	$ 3,630.90
1996 / 1	13	35	$ 8.21	$ 3,735.55
1996 / 2	11	35	$ 8.21	$ 3,160.85
1996 / 3	7	35	$ 8.21	$ 2,011.45
1996 / 4	13	35	$ 8.21	$ 3,735.55
1997 / 1	13	35	$ 8.53	$ 3,881.15
1997 / 2	11	35	$ 8.53	$ 3,284.05
			TOTAL:	**$ 25,394.60**

Karen Gajewski (Specification Schedule B–4)

For the reasons discussed above, I have rejected Respondent's argument that it made an offer of reinstatement which tolled Gajewski's backpay. Accordingly, Gajewski's backpay period continues.

In its Schedule B–4, the Specification alleges that Gajewski's backpay should be calculated at an hourly wage rate of $7.98 for the third and fourth quarters of 1995, at a rate of $8.30 for all four quarters of 1996, at a rate of $8.63 for all four quarters in 1997, at a rate of $8.98 for all four quarters in 1998, at a rate of $9.34 for the four quarters of 1999, at a rate of $9.71 for the four quarters of 2000, at a rate of $10.10 for the four quarters of 2001, at a rate of $10.50 for the four quarters of 2002, at a rate of $10.92 for the four quarters of 2003, and at a rate of $11.36 for the first three quarters of 2004. The Specification does not calculate Gajewski's backpay beyond the third quarter of 2004.

Respondent's Answer averred, in effect, that Gajewski's wage rate was $7.68 before June 1996, and in 1996–1997. It does not specifically alleged what Gajewski's wage rate should have been in 1997. It further stated that after 1999, the wage rate would be controlled by the collective bargaining agreement, which the Answer included as an exhibit.

Respondent's Answer further stated that "Upon current information and belief, the number of weeks are miscalculated in that the computation does not accurately reflect weeks worked, and deduct for unpaid holidays, unpaid school breaks, vacations and summer break."

For reasons discussed above, I reject Respondent's argument that the Specification does not accurately reflect the weeks Gajewski would have worked. Additionally, Respondent has not carried its burden of proving that the Specification otherwise was inaccurate with respect to holidays, school breaks, and vacation time.

Compliance Officer Zane testified that Gajewski was earning $7.98 per hour at the time of the discrimination against her. I credit that testimony. Accordingly, and contrary to Respondent's Answer, I conclude that Schedule B–4 listed the appropriate wage rate for Gajewski for the third and fourth quarters of 1995.

Beginning with the first quarter of 1996, Schedule B–4 increases Gajewski's wage rate by 4 percent each year, to take into account the annual cost–of–living adjustments. However, the evidence establishes that in some specific years, Respondent did not grant a 4 percent COLA. For example, for the 1995–1996 fiscal year, the COLA was only 3 percent, so Gajewski's hourly wage increased from $7.98 to $8.21, not to $8.30, as alleged in the Specification.

Respondent and the Union entered into a collective–bargaining agreement effective December 1, 1999 through November 30, 2002. For the reasons discussed above, I conclude that this contract does not affect the wage rates to be used in computing Gajewski's backpay. Similarly, considering that the terms of the collective–bargaining agreement specifically preserve an employee's entitlement to cost–of–living adjustments, I conclude that COLA increases should be figured into Gajewski's backpay.

In sum, I conclude that Gajewski's backpay should be calculated at the following wage rates:

Fiscal Year	Hourly Wage Rate	COLA Increase	New Hourly Wage Rate
1996–1997	$ 7.98	4.0%	$ 8.29
1997–1998	$ 8.29	4.0%	$ 8.62
1998–1999	$ 8.62	1.5%	$ 8.74
1999–2000	$ 8.74	2.6%	$ 8.97
2000–2001	$ 8.97	3.5%	$ 9.28
2001–2002	$ 9.28	2.6%	$ 9.52
2002–2003	$ 9.52	4.0%	$ 9.90
2003–2004	$ 9.90	4.0%	$ 10.30

5 Multiplying the applicable wage rate by the hours Gajewski would have worked in a calendar quarter yields the gross backpay for that quarter. In sum, Gajewski's gross backpay, after the corrections described above, is as follows:

Year / Quarter	No. of Weeks	Regular Hours	Wage Rate	Gross Backpay
1995 / 3	7	35	$ 7.98	$ 1,955.10
1995 / 4	13	35	$ 7.98	$ 3,630.90
1996 / 1	13	35	$ 8.21	$ 3,735.55
1996 / 2	11	35	$ 8.21	$ 3,160.85
1996 / 3	7	35	$ 8.21	$ 2,011.45
1996 / 4	13	35	$ 8.21	$ 3,735.55
1997 / 1	13	35	$ 8.53	$ 3,881.15
1997 / 2	11	35	$ 8.53	$ 3,284.05
1997 / 3	7	35	$ 8.53	$ 2,089.85
1997 / 4	13	35	$ 8.53	$ 3,881.15
1998 / 1	13	35	$ 8.87	$ 4,035.85
1998 / 2	11	35	$ 8.87	$ 3,414.95
1998 / 3	7	35	$ 8.87	$ 2,173.15
1998 / 4	13	35	$ 8.87	$ 4,035.85
1999 / 1	13	35	$ 9.00	$ 4,095.00
1999 / 2	11	35	$ 9.00	$ 3,465.00
1999 / 3	7	35	$ 9.00	$ 2,205.00
1999 / 4	13	35	$ 9.00	$ 4,095.00
2000 / 1	13	35	$ 9.23	$ 4,199.65
2000 / 2	11	35	$ 9.23	$ 3,553.55
2000 / 3	7	35	$ 9.23	$ 2,261.35
2000 / 4	13	35	$ 9.23	$ 4,199.65
2001 / 1	13	35	$ 9.55	$ 4,345.25
2001 / 2	11	35	$ 9.55	$ 3,676.75
2001 / 3	7	35	$ 9.55	$ 2,339.75
2001 / 4	13	35	$ 9.55	$ 4,345.25
2002 / 1	13	35	$ 9.80	$ 4,459.00
2002 / 2	11	35	$ 9.80	$ 3,773.00

Year / Quarter	No. of Weeks	Regular Hours	Wage Rate	Gross Backpay
2002 / 3	7	35	$ 9.80	$ 2,401.00
2002 / 4	13	35	$ 9.80	$ 4,459.00
2003 / 1	13	35	$10.19	$ 4,636.45
2003 / 2	11	35	$10.19	$ 3,923.15
2003 / 3	7	35	$10.19	$ 2,496.55
2003 / 4	13	35	$10.19	$ 4,636.45
2004 / 1	13	35	$10.60	$ 4,823.00
2004 / 2	11	35	$10.60	$ 4,081.00
2004 / 3	7	35	$10.60	$ 2,597.00
			TOTAL:	**$130,092.20**

Fugere and Feliczak

Discriminatees Fugere and Feliczak worked part of the time in Respondent's Head Start program and part of the time in Respondent's other programs. Respondent could not identify what percentage of time each discriminatee spent performing work for the Head Start program.

Although, in its brief, Respondent contends that their Head Start work should affect the COLA calculations for Fugere and Feliczak, Respondent has not asserted that such Head Start duties affect their vacation pay. To the extent that Respondent does raise such an assertion, it is no more persuasive here than it was with respect to Kukla, Meyers, Lange and Gajewski. Therefore, I reject it.

Verna Fugere (Specification Schedule B–5)

The Specification's Schedule B–5 sets forth the General Counsel's backpay calculations for Verna Fugere. At hearing, the General Counsel amended the Specification to allege that during the second quarter of 1995, Fugere would have worked 4 weeks (rather than 6 weeks).

Respondent's Answer states, in part, as follows: "Upon current information and belief, the number of weeks are miscalculated in that the computation does not accurately reflect weeks worked, and deduct for unpaid holidays, unpaid school breaks, vacations and summer break." For reasons discussed above, I have rejected this position and instead conclude that the figures set forth in the Specification are appropriate.

Respondent's Answer also disputes Schedule B–5 in the following respects: Respondent asserts that during the period 1994–1999, Fugere's wage rate was $8.00 and that Fugere, as a community support worker, did not receive a cost–of–living adjustment.

The parties stipulated at hearing that Fugere's wage rate in the second quarter of 1995 would have been $8.00. I so find. Fugere testified that while employed by Respondent during the period 1988 and 1995, she received a cost–of–living adjustment "most every year." Based upon my observations of the witnesses, I credit Fugere and, accordingly, reject Respondent's assertion that Fugere did not receive cost–of–living adjustments. Moreover, to the extent that there is any doubt

about whether Fugere would have received a cost–of–living allowance in a particular year, I resolve that doubt in favor of Fugere rather than Respondent.

Because Fugere received cost–of–living adjustments, her wage rate did not remain at $8.00 an hour. Rather, I conclude that it increased each year of the backpay period through 1999 by the amount of the applicable COLA as discussed above. Specifically, I find that Fugere is entitled to the following cost–of–living adjustments:

Fiscal Year	Hourly Wage Rate	COLA Increase	New Hourly Wage Rate
1995–1996	$ 8.00	3.0%	$ 8.24
1996–1997	$ 8.24	4.0%	$ 8.57
1997–1998	$ 8.57	4.0%	$ 8.91
1998–1999	$ 8.91	1.5%	$ 9.04
1999–2000	$ 9.04	2.6%	$ 9.28
2000–2001	$ 9.28	3.5%	$ 9.60
2001–2002	$ 9.60	2.6%	$ 9.85
2002–2003	$ 9.85	4.0%	$10.24
2003–2004	$10.24	4.0%	$10.65

Respondent's Answer further alleges that after 1999, Fugere's wage rate would be controlled by the collective–bargaining agreements. However, for the reasons discussed above, I conclude that those agreements do not constitute a limitation.

The parties stipulated at hearing and I now find that before her discharge, Fugere was a fulltime employee who normally worked 40 hours per week. The table below summarizes my findings with respect to her hourly wage rates, as affected by the cost–of–living adjustments and by the collective–bargaining agreement, and my conclusions concerning her gross backpay.

Year / Quarter	No. of Weeks	Regular Hours	Wage Rate	Gross Backpay
1995 / 2	4	40	$ 8.00	$ 1,280.00
1995 / 3	13	40	$ 8.00	$ 4,160.00
1995 / 4	15	40	$ 8.00	$ 4,800.00
1996 / 1	13	40	$ 8.24	$ 4,284.80
1996 / 2	13	40	$ 8.24	$ 4,284.80
1996 / 3	13	40	$ 8.24	$ 4,284.80
1996 / 4	15	40	$ 8.24	$ 4,944.00
1997 / 1	13	40	$ 8.57	$ 4,456.40
1997 / 2	13	40	$ 8.57	$ 4,456.40
1997 / 3	13	40	$ 8.57	$ 4,456.40
1997 / 4	15	40	$ 8.57	$ 5,142.00
1998 / 1	13	40	$ 8.91	$ 4,633.20
1998 / 2	13	40	$ 8.91	$ 4,633.20
1998 / 3	13	40	$ 8.91	$ 4,633.20
1998 / 4	15	40	$ 8.91	$ 5,346.00
1999 / 1	13	40	$ 9.04	$ 4,700.80

Year / Quarter	No. of Weeks	Regular Hours	Wage Rate	Gross Backpay
1999 / 2	3	40	$ 9.04	$ 4,700.80
1999 / 3	13	40	$ 9.04	$ 4,700.80
1999 / 4	15	40	$ 9.04	$ 5,424.00
2000 / 1	13	40	$ 9.28	$ 4,825.60
2000 / 2	13	40	$ 9.28	$ 4,825.60
2000 / 3	13	40	$ 9.28	$ 4,825.60
2000 / 4	15	40	$ 9.28	$ 5,568.00
2001 / 1	13	40	$ 9.60	$ 4,992.00
2001 / 2	13	40	$ 9.60	$ 4,992.00
2001 / 3	13	40	$ 9.60	$ 4,992.00
2001 / 4	15	40	$ 9.60	$ 5,760.00
2002 / 1	13	40	$ 9.85	$ 5,122.00
2002 / 2	13	40	$ 9.85	$ 5,122.00
2002 / 3	13	40	$ 9.85	$ 5,122.00
2002 / 4	15	40	$ 9.85	$ 5,910.00
2003 / 1	13	40	$10.24	$ 5,324.80
2003 / 2	13	40	$10.24	$ 5,324.80
2003 / 3	13	40	$10.24	$ 5,324.80
2003 / 4	15	40	$10.24	$ 6,144.00
2004 / 1	13	40	$10.65	$ 5,538.00
2004 / 2	13	40	$10.65	$ 5,538.00
2004 / 3	13	40	$10.65	$ 5,538.00
			TOTAL:	**$186,110.80**

Florence Feliczak (Specification Schedule B–6)

Florence Feliczak began work for Respondent in September 1992 as a data entry clerk and held that position until April 1997, when Respondent eliminated her position without first notifying the Union and affording it an opportunity to bargain. This unilateral change violated Section 8(a)(5) and (1) of the Act.

For the reasons discussed above, I have rejected Respondent's arguments that Feliczak's backpay period already has ended. Rather, I have found that it was continuing at the time of the hearing, and will continue thereafter until Respondent makes a valid offer of reinstatement.

Respondent's Answer makes two other assertions. It states, in pertinent part, as follows:

> a. Ms. Feliczak's wage rate has been miscalculated. Ms. Feliczak's wage rate was $6.72. Data entry workers do not receive COLA.
>
> b. Upon current information and belief, the number of weeks are miscalculated in that the computation does not accurately reflect weeks worked and deduct for unpaid holidays and sick time.

The Specification, in Schedule B–6, alleged that Feliczak's hourly wage rate in the second quarter of 1997 was $6.90. However, at hearing, the General Counsel amended the Specification to allege this rate to be $6.72 an hour. Thus, the General Counsel and Respondent are in agreement regarding Feliczak's wage rate during this calendar quarter. I so find.

Read literally, Respondent's Answer does not deny that Feliczak received cost–of–living adjustments. However, it does state that data entry workers do not receive cost–of–living adjustments, and Ms. Feliczak clearly was a data entry clerk. Therefore, I conclude that the Answer sufficiently alleges that Feliczak did not receive such adjustments.

However, the credible evidence quite clearly contradicts Respondent on this point. Feliczak testified that she did receive such increases: "[I]t was once a year, like the beginning of November." Based on my observations of the witnesses, I credit Feliczak's testimony.

Additionally, payroll slips and memoranda from Respondent's executive director, which the General Counsel introduced into evidence, corroborate Feliczak's testimony. Accordingly, I conclude that Feliczak did receive cost–of–living adjustments.

Although Respondent's Answer asserted that Feliczak received *no* cost–of–living adjustment at all, it receded from this position in its post–hearing brief:

> Being that the differing funding sources allocated to FiveCAP are all dedicated funds, FiveCAP does pay these employees partial COLA for that portion of those employees[']salary [sic] which is funded under Head Start, but not that portion funded from other (non–COLA) programs. (Tr. 375–76, 584) [Respondent's Executive Director Mary] Trucks testified that the majority of the funding for such positions ("over 50%") was from the CSBG [Community Service Block Grant] grant (for which there is no COLA). Ms. Trucks was unable to identify what remaining portion of the 50% of those positions funding was paid through Head Start. As such, providing the required benefit of the doubt to Ms. Fugere and Ms. Feliczak, FiveCAP asserts that each employee be provided a COLA rate equal to 1/2 of the COLA rate reflected in the next section of this brief. Such rates are reflected in the attached exhibits.

Respondent's proposal to pay Feliczak one–half of the COLA amount given to other eligible employees must be rejected. Although Respondent's brief indicates that management does not know how much of Feliczak's compensation it paid with Head Start funds and how much came from other sources, the Respondent *should* know. The federal government entrusted Respondent with taxpayers' money to perform certain specified services. Essentially, Respondent had a fiduciary duty, or something quite similar, to keep track of the funds it received from the federal government and to expend them in the manner the grants specified.

Having undertaken to receive, manage and expend federal grants, Respondent cannot credibly deny knowing what it did with the money. To the contrary, Respondent is in a unique position to have knowledge of how it allocated the funds it received.

Moreover, Respondent's executive director, Mary Trucks, testified that "All of our funds are restricted Dollars, dedicated Dollars to use." She explained that restricted dollars are "Grant funds provided, for a specified purpose. . ." In view of this testimony, as well as Respondent's duty to

account for the federal money it has received, the claim that Respondent doesn't know how it allocated the funds is hard to believe.

Presumably, routine bookkeeping should record and reveal how Respondent routed each of these "dedicated dollars." Accordingly, Respondent's claim is inherently incredible and, in the absence of supporting evidence, I reject it. Therefore, I conclude that such matters are within the knowledge of Respondent. As discussed above, in such circumstances, Section 102.56 of the Board's Rules directs as follows:

> As to all matters within the knowledge of the respondent. . .a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.

This Rule requires that Respondent do more than deny in its Answer that Feliczak would receive *any* COLA and then propose in its brief that Feliczak be given one–half the COLA received by other employees. However, Respondent's Answer neither provided the necessary details regarding Feliczak's cost–of–living adjustments nor explained why it could not.

In these circumstances, pursuant to Section 102.56(c), I will deem that Respondent admitted the General Counsel's allegations concerning Feliczak's cost–of–living adjustments.

However, as discussed above, the Specification incorrectly assumes a 4 percent cost–of–living adjustment each year. Accordingly, the hourly wage rates set forth in Schedule B–6 must be modified by taking the initial $6.90 hourly wage and increasing it each year by the appropriate COLA amount.

Fiscal Year	Hourly Wage Rate	COLA Increase	New Hourly Wage Rate
1997–1998	$ 6.90	4.0%	$ 7.18
1998–1999	$ 7.18	1.5%	$ 7.29
1999–2000	$ 7.29	2.6%	$ 7.48
2000–2001	$ 7.48	3.5%	$ 7.74
2001–2002	$ 7.74	2.6%	$ 7.94
2002–2003	$ 7.94	4.0%	$ 8.26
2003–2004	$ 8.26	4.0%	$ 8.59

The table below sets forth my findings with respect to Feliczak's gross backpay.

Year / Quarter	No. of Weeks	Regular Hours	Wage Rate	Gross Backpay
1997 / 2	13	24	$ 6.90	$ 2,152.80
1997 / 3	13	24	$ 6.90	$ 2,152.80
1997 / 4	13	24	$ 6.90	$ 2,152.80
1998 / 1	13	24	$ 7.18	$ 2,240.16
1998 / 2	13	24	$ 7.18	$ 2,240.16
1998 / 3	13	24	$ 7.18	$ 2,240.16

Year / Quarter	No. of Weeks	Regular Hours	Wage Rate	Gross Backpay
1998 / 4	13	24	$ 7.18	$ 2,240.16
1999 / 1	13	24	$ 7.29	$ 2,274.48
1999 / 2	13	24	$ 7.29	$ 2,274.48
1999 / 3	13	24	$ 7.29	$ 2,274.48
1999 / 4	13	24	$ 7.29	$ 2,274.48
2000 / 1	13	24	$ 7.48	$ 2,333.76
2000 / 2	13	24	$ 7.48	$ 2,333.76
2000 / 3	13	24	$ 7.48	$ 2,333.76
2000 / 4	13	24	$ 7.48	$ 2,333.76
2001 / 1	13	24	$ 7.74	$ 2,414.88
2001 / 2	13	24	$ 7.74	$ 2,414.88
2001 / 3	13	24	$ 7.74	$ 2,414.88
2001 / 4	13	24	$ 7.74	$ 2,414.88
2002 / 1	13	24	$ 7.94	$ 2,477.28
2002 / 2	13	24	$ 7.94	$ 2,477.28
2002 / 3	13	24	$ 7.94	$ 2,477.28
2002 / 4	13	24	$ 7.94	$ 2,477.28
2003 / 1	13	24	$ 8.26	$ 2,577.12
2003 / 2	13	24	$ 8.26	$ 2,577.12
2003 / 3	13	24	$ 8.26	$ 2,577.12
2003 / 4	13	24	$ 8.26	$ 2,577.12
2004 / 1	13	24	$ 8.59	$ 2,680.08
2004 / 2	13	24	$ 8.59	$ 2,680.08
2004 / 3	13	24	$ 8.59	$ 2,680.08
			TOTAL:	**$ 71,769.36**

Dale R. Smith (Specification Schedule B–7)

During the hearing, the parties stipulated that Dale R. Smith was a regular employee scheduled to work 40 hours a week and that his regular wage in the second quarter of 1995 was $6.00 per hour. Accordingly, I conclude that the figures alleged in the "REGULAR HOURS" and "NO. OF WEEKS" columns f Schedule B–7 are correct.

In computing the gross backpay amounts alleged in Schedule B–7, the compliance officer assumed that Smith would have received a 4 percent cost–of–living adjustment each year. However, the record does not establish that Smith would have received cost–of–living adjustments or other wage increases. I conclude that he did not.

The Respondent and the Union entered into a collective–bargaining agreement which took effect December 1, 1999. This agreement set the starting wage for weatherization inspectors at $7.31 per hour. Because the Specification computes backpay on a quarterly basis, I will apply this wage rate beginning with the first quarter of 2000.

On December 1, 2002, a second collective–bargaining agreement superseded the first. However, this agreement did not specify the wage rate for weatherization inspector. Therefore, I

will assume that Smith's wage rate remained $7.31 per hour. The table below summarizes my calculations:

Year / Quarter	No. of Weeks	Regular Hours	Wage Rate	Gross Backpay
1995 / 2	8	40	$ 6.00	$ 1,920.00
1995 / 3	13	40	$ 6.00	$ 3,120.00
1995 / 4	15	40	$ 6.00	$ 3,600.00
1996 / 1	13	40	$ 6.00	$ 3,120.00
1996 / 2	13	40	$ 6.00	$ 3,120.00
1996 / 3	13	40	$ 6.00	$ 3,120.00
1996 / 4	13	40	$ 6.00	$ 3,120.00
1997 / 1	13	40	$ 6.00	$ 3,120.00
1997 / 2	13	40	$ 6.00	$ 3,120.00
1997 / 3	13	40	$ 6.00	$ 3,120.00
1997 / 4	15	40	$ 6.00	$ 3,600.00
1998 / 1	13	40	$ 6.00	$ 3,120.00
1998 / 2	13	40	$ 6.00	$ 3,120.00
1998 / 3	13	40	$ 6.00	$ 3,120.00
1998 / 4	15	40	$ 6.00	$ 3,600.00
1999 / 1	13	40	$ 6.00	$ 3,120.00
1999 / 2	13	40	$ 6.00	$ 3,120.00
1999 / 3	13	40	$ 6.00	$ 3,120.00
1999 / 4	15	40	$ 7.31	$ 4,386.00
2000 / 1	13	40	$ 7.31	$ 3,801.20
2000 / 2	13	40	$ 7.31	$ 3,801.20
2000 / 3	13	40	$ 7.31	$ 3,801.20
2000 / 4	15	40	$ 7.31	$ 4,386.00
2001 / 1	13	40	$ 7.31	$ 3,801.20
2001 / 2	13	40	$ 7.31	$ 3,801.20
2001 / 3	13	40	$ 7.31	$ 3,801.20
2001 / 4	15	40	$ 7.31	$ 4,386.00
2002 / 1	13	40	$ 7.31	$ 3,801.20
2002 / 2	13	40	$ 7.31	$ 3,801.20
2002 / 3	13	40	$ 7.31	$ 3,801.20
2002 / 4	15	40	$ 7.31	$ 4,386.00
2003 / 1	13	40	$ 7.31	$ 3,801.20
2003 / 2	13	40	$ 7.31	$ 3,801.20
2003 / 3	13	40	$ 7.31	$ 3,801.20
2003 / 4	15	40	$ 7.31	$ 4,386.00
2004 / 1	13	40	$ 7.31	$ 3,801.20
2004 / 2	13	40	$ 7.31	$ 3,801.20
2004 / 3	13	40	$ 7.31	$ 3,801.20
			TOTAL :	**$135,348.00**

Tom Belongia (Specification Schedule B–8)

Although Belongia's job title was "field supervisor/inspector," he was not a supervisor within the meaning of Section 2(11) of the Act. Rather, he performed work much like that done by Dale Smith.

At hearing, the parties stipulated that his employment began June 8, 1992, and that at the time of his discharge in 1995, he was eligible for vacation benefits. They further stipulated that he was a fulltime employee who worked a regular schedule of 40 hours a week and that his regular wage rate in the second quarter of 1995 was $7.36 per hour. I so find.

Belongia's wage rate exceeded the $7.31 per hour starting wage rate specified in the 1999–2002 collective–bargaining agreement. Therefore, I have calculating Belongia's backpay using the $7.36 wage rate for all quarters.

The record does not establish that Belongia would have received cost–of–living increases. Therefore, I have not included such increases in the backpay computations.

The following table summarizes my findings concerning Belongia's gross backpay.

Year / Quarter	No. of Weeks	Regular Hours	Wage Rate	Gross Backpay
1995 / 2	12	40	$ 7.36	$ 3,532.80
1995 / 3	13	40	$ 7.36	$ 3,827.20
1995 / 4	15	40	$ 7.36	$ 4,416.00
1996 / 1	13	40	$ 7.36	$ 3,827.20
1996 / 2	13	40	$ 7.36	$ 3,827.20
1996 / 3	13	40	$ 7.36	$ 3,827.20
1996 / 4	15	40	$ 7.36	$ 4,416.00
1997 / 1	13	40	$ 7.36	$ 3,827.20
1997 / 2	13	40	$ 7.36	$ 3,827.20
1997 / 3	13	40	$ 7.36	$ 3,827.20
1997 / 4	15	40	$ 7.36	$ 4,416.00
1998 / 1	13	40	$ 7.36	$ 3,827.20
1998 / 2	13	40	$ 7.36	$ 3,827.20
1998 / 3	13	40	$ 7.36	$ 3,827.20
1998 / 4	15	40	$ 7.36	$ 4,416.00
1999 / 1	13	40	$ 7.36	$ 3,827.20
1999 / 2	13	40	$ 7.36	$ 3,827.20
1999 / 3	13	40	$ 7.36	$ 3,827.20
1999 / 4	15	40	$ 7.36	$ 4,416.00
2000 / 1	13	40	$ 7.36	$ 3,827.20
2000 / 2	13	40	$ 7.36	$ 3,827.20
2000 / 3	13	40	$ 7.36	$ 3,827.20
2000 / 4	15	40	$ 7.36	$ 4,416.00
2001 / 1	13	40	$ 7.36	$ 3,827.20

Year / Quarter	No. of Weeks	Regular Hours	Wage Rate	Gross Backpay
2001 / 2	13	40	$ 7.36	$ 3,827.20
2001 / 3	13	40	$ 7.36	$ 3,827.20
2001 / 4	15	40	$ 7.36	$ 4,416.00
2002 / 1	13	40	$ 7.36	$ 3,827.20
2002 / 2	13	40	$ 7.36	$ 3,827.20
2002 / 3	13	40	$ 7.36	$ 3,827.20
2002 / 4	15	40	$ 7.36	$ 4,416.00
2003 / 1	13	40	$ 7.36	$ 3,827.20
2003 / 2	13	40	$ 7.36	$ 3,827.20
2003 / 3	13	40	$ 7.36	$ 3,827.20
2003 / 4	15	40	$ 7.36	$ 4,416.00
2004 / 1	13	40	$ 7.36	$ 3,827.20
2004 / 2	13	40	$ 7.36	$ 3,827.20
2004 / 3	13	40	$ 7.36	$ 3,827.20
			TOTAL:	**$150,438.40**

David Monton (Specification Schedule B–8)

The parties stipulated that David Monton was a fulltime employee who worked a regular schedule of 40 hours per week, and that his regular wage rate in the third quarter of 1995 was $5.52 an hour. The parties also stipulated that Monton was eligible for vacation benefits at the time of his layoff. I so find.

The record does not establish that Monton received cost–of–living increases and I conclude that he did not. I further conclude that his hourly wage remained $5.52 until the collective–bargaining agreement increased it to $7.31 on December 1, 1999. Because the Specification computes backpay by calendar quarter, I will apply the $7.31 wage rate beginning with the first quarter of 2000.

The 2002–2005 agreement did not specify the wage rate for weatherization inspector. Accordingly, I conclude that the rate continued to be $7.31. The following table summarizes my calculations of Monton's gross backpay.

Year / Quarter	No. of Weeks	Regular Hours	Wage Rate	Gross Backpay
1995 / 3	13	40	$ 5.52	$ 2,870.40
1995 / 4	15	40	$ 5.52	$ 3,312.00
1996 / 1	13	40	$ 5.52	$ 2,870.40
1996 / 2	13	40	$ 5.52	$ 2,870.40
1996 / 3	13	40	$ 5.52	$ 2,870.40
1996 / 4	15	40	$ 5.52	$ 3,312.00
1997 / 1	13	40	$ 5.52	$ 2,870.40
1997 / 2	13	40	$ 5.52	$ 2,870.40
1997 / 3	13	40	$ 5.52	$ 2,870.40

Year / Quarter	No. of Weeks	Regular Hours	Wage Rate	Gross Backpay
1997 / 4	15	40	$ 5.52	$ 3,312.00
1998 / 1	13	40	$ 5.52	$ 2,870.40
1998 / 2	13	40	$ 5.52	$ 2,870.40
1998 / 3	13	40	$ 5.52	$ 2,870.40
1998 / 4	15	40	$ 5.52	$ 3,312.00
1999 / 1	13	40	$ 5.52	$ 2,870.40
1999 / 2	13	40	$ 5.52	$ 2,870.40
1999 / 3	13	40	$ 5.52	$ 2,870.40
1999 / 4	15	40	$ 5.52	$ 3,312.00
2000 / 1	13	40	$ 7.31	$ 3,801.20
2000 / 2	13	40	$ 7.31	$ 3,801.20
2000 / 3	13	40	$ 7.31	$ 3,801.20
2000 / 4	15	40	$ 7.31	$ 4,386.00
2001 / 1	13	40	$ 7.31	$ 3,801.20
2001 / 2	13	40	$ 7.31	$ 3,801.20
2001 / 3	13	40	$ 7.31	$ 3,801.20
2001 / 4	15	40	$ 7.31	$ 4,386.00
2002 / 1	13	40	$ 7.31	$ 3,801.20
2002 / 2	13	40	$ 7.31	$ 3,801.20
2002 / 3	13	40	$ 7.31	$ 3,801.20
2002 / 4	15	40	$ 7.31	$ 4,386.00
2003 / 1	13	40	$ 7.31	$ 3,801.20
2003 / 2	13	40	$ 7.31	$ 3,801.20
2003 / 3	13	40	$ 7.31	$ 3,801.20
2003 / 4	15	40	$ 7.31	$ 4,386.00
2004 / 1	13	40	$ 7.31	$ 3,801.20
2004 / 2	13	40	$ 7.31	$ 3,801.20
2004 / 3	13	40	$ 7.31	$ 3,801.20
			TOTAL:	**$128,437.20**

Art Burkel (Specification Schedule B–10)

Respondent employed Art Burkel as a laborer. At hearing, the parties stipulated that Burkel's wage rate was $5.01 as of the third quarter of 1995. I so find. The following table sets forth my computation of Burkel's backpay.

Year / Quarter	No. of Weeks	Hours	Wage Rate	Gross Backpay
1995 / 3	7	55	$ 5.01	$ 1,928.85
1995 / 4	13	55	$ 5.01	$ 3,582.15
			TOTAL:	**$ 5,511.00**

Bruce Kent (Specification Schedule B–11)

Respondent employed Bruce Kent as a bus driver. The parties stipulated that Kent's wage rate during the third quarter of 1995 was $7.50 per hour.

5

The record establishes that Kent would have received cost–of–living increases. Therefore, the wage rate used in calculating his backpay will be increased each by the same cost–of–living adjustment applied to other eligible discriminatees.

Year / Quarter	No. of Weeks	Hours	Wage Rate	Gross Backpay
1995 / 3	7	8	$ 7.50	$ 420.00
1995 / 4	13	8	$ 7.50	$ 780.00
1996 / 1	13	8	$ 7.72	$ 802.88
1996 / 2	11	8	$ 7.72	$ 679.36
1996 / 3	7	8	$ 7.72	$ 432.32
1996 / 4	13	8	$ 7.72	$ 802.88
1997 / 1	13	8	$ 8.02	$ 834.08
1997 / 2	11	8	$ 8.02	$ 705.76
1997 / 3	7	8	$ 8.02	$ 449.12
1997 / 4	13	8	$ 8.02	$ 834.08
1998 / 1	13	8	$ 8.34	$ 867.36
1998 / 2	11	8	$ 8.34	$ 733.92
1998 / 3	7	8	$ 8.34	$ 467.04
1998 / 4	13	8	$ 8.34	$ 867.36
1999 / 1	13	8	$ 8.47	$ 880.88
1999 / 2	11	8	$ 8.47	$ 745.36
1999 / 3	7	8	$ 8.47	$ 474.32
1999 / 4	13	8	$ 8.47	$ 880.88
2000 / 1	13	8	$10.37	$ 1,078.48
2000 / 2	11	8	$10.37	$ 912.56
2000 / 3	7	8	$10.37	$ 580.72
2000 / 4	13	8	$10.37	$ 1,078.48
2001 / 1	13	8	$10.37	$ 1,078.48
2001 / 2	11	8	$10.37	$ 912.56
2001 / 3	7	8	$10.37	$ 580.72
2001 / 4	13	8	$10.37	$ 1,078.48
2002 / 1	13	8	$10.37	$ 1,078.48
2002 / 2	11	8	$10.37	$ 912.56
2002 / 3	7	8	$10.37	$ 580.72
2002 / 4	13	8	$10.37	$ 1,078.48
2003 / 1	13	8	$10.37	$ 1,078.48
2003 / 2	11	8	$10.37	$ 912.56
2003 / 3	7	8	$10.37	$ 580.72
2003 / 4	13	8	$10.37	$ 1,078.48

Year / Quarter	No. of Weeks	Hours	Wage Rate	Gross Backpay
2004 / 1	13	8	$10.37	$ 1,078.48
2004 / 2	11	8	$10.37	$ 912.56
2004 / 3	7	8	$10.37	$ 580.72
			TOTAL:	**$ 29,830.32**

Specification Paragraph 5

Paragraph 5 of the Specification, together with Specification Schedule C, allege that Respondent provided health insurance coverage for Dale R. Smith during his employment. Respondent's Answer denied "as untrue any allegation that Dale Smith would, for the period at issue, have been eligible for health insurance. Health Insurance is only funded for Head Start employees."

During the hearing, Dale Smith testified that Respondent did pay for health insurance during his employment. Based on my observations of the witnesses, I credit Smith's testimony. Accordingly, I conclude that the General Counsel has proven the allegations raised by Specification Paragraph 5 and in Specification Schedule C.

Specification Paragraph 6

Paragraph 6 of the Specification alleges as follows: "Interim earnings, where appropriate, are deducted from gross backpay to yield net backpay. See Schedules B–1 through B–11." Respondent's Answer states:

> FiveCAP, Inc. admits that the deduction of interim earnings is required by law; FiveCAP, Inc. neither admits nor denies the calculation or completeness of the computation, where available, set forth on the Schedules in that FiveCAP, Inc. lacks present information or belief as to the truth of such allegation.

In the absence of evidence to the contrary, I will not presume that Respondent knew how much a discriminatee earned while working for some other employer. Therefore, Respondent's general denial suffices to satisfy the requirements of Section 102.56.

In effect, the interim earnings alleged in Schedules B–1 through B–11 constitute admissions by the government that a discriminatee earned the indicated amount in the specified calendar quarter. Respondent bears the burden of proving that a discriminatee earned more than the amounts which the Specification has admitted. However, the present record does not establish that any discriminatee had interim earnings beyond the amounts described in the Specification. I find that Schedules B–1 through B–11 accurately set forth the interim earnings of the discriminatees.

Net backpay is computed by subtracting the interim earnings in a particular calendar quarter from the gross backpay for that calendar quarter. The following tables summarize my calculations of net backpay, based upon the gross backpay figures found above and the interim earning figures alleged in the Specification.

Melissa A. Kukla (Specification Schedule B–1)

Year / Quarter	Gross Backpay	Interim Earnings	Net Backpay
1995 / 3	$ 2,156.00	$ 0.00	$ 2,156.00
1995 / 4	$ 4,140.50	$ 0.00	$ 4,140.50
1996 / 1	$ 4,263.35	$ 0.00	$ 4,263.35
1996 / 2	$ 3,607.45	$ 0.00	$ 3,607.45
1996 / 3	$ 2,295.65	$ 83.33	$ 2,212.32
1996 / 4	$ 4,431.70	$ 83.33	$ 4,348.37
1997 / 1	$ 4,431.70	$ 83.33	$ 4,348.37
1997 / 2	$ 3,749.90	$ 0.00	$ 3,749.90
1998 / 1	$ 2,125.20	$ 0.00	$ 2,125.20
1998 / 2	$ 354.20	$ 0.00	$ 354.20
		TOTAL NET BACKPAY:	**$ 31,305.66**

Jane E. Myers (Specification Schedule B–2)

Year / Quarter	Gross Backpay	Interim Earnings	Net Backpay
1995 / 3	$ 2,031.05	$ 0.00	$ 2,031.05
1995 / 4	$ 3,771.95	$ 2,502.50	$ 1,269.45
1996 / 1	$ 3,881.15	$ 2,502.50	$ 1,378.65
1996 / 2	$ 3,284.05	$ 1,732.50	$ 1,551.55
1996 / 3	$ 2,089.85	$ 1,347.50	$ 742.35
1996 / 4	$ 3,881.15	$ 2,502.50	$ 1,378.65
1997 / 1	$ 4,035.85	$ 2,616.25	$ 1,419.60
1997 / 2	$ 3,414.95	$ 1,811.25	$ 1,603.70
1997 / 3	$ 2,173.15	$ 603.75	$ 1,569.40
		TOTAL NET BACKPAY:	**$ 12,944.40**

Amanda Lange (Specification Schedule B–3)

Year / Quarter	Gross Backpay	Interim Earnings	Net Backpay
1995 / 3	$ 1,955.10	$ 0.00	$ 1,955.10
1995 / 4	$ 3,630.90	$ 0.00	$ 3,630.90
1996 / 1	$ 3,735.55	$ 2,972.28	$ 763.27
1996 / 2	$ 3,160.85	$ 2,076.90	$ 1,083.95
1996 / 3	$ 2,011.45	$ 548.83	$ 1,462.62
1996 / 4	$ 3,735.55	$ 2,526.65	$ 1,208.90
1997 / 1	$ 3,881.15	$ 1,965.25	$ 1,915.90
1997 / 2	$ 3,284.05	$ 1,038.53	$ 2,245.52
		TOTAL NET BACKPAY:	**$ 14,266.16**

Karen A. Gajewski (Specification Schedule B–4)

Year / Quarter	Gross Backpay	Interim Earnings	Net Backpay
1995 / 3	$ 1,955.10	$ 884.45	$ 1,070.65
1995 / 4	$ 3,630.90	$ 1,642.55	$ 1,988.35
1996 / 1	$ 3,735.55	$ 1,642.55	$ 2,093.00
1996 / 2	$ 3,160.85	$ 1,137.15	$ 2,023.70
1996 / 3	$ 2,011.45	$ 884.45	$ 1,127.00
1996 / 4	$ 3,735.55	$ 1,642.55	$ 2,093.00
1997 / 1	$ 3,881.15	$ 542.50	$ 3,338.65
1997 / 2	$ 3,284.05	$ 459.04	$ 2,825.01
1997 / 3	$ 2,089.85	$ 292.12	$ 1,797.73
1997 / 4	$ 3,881.15	$ 542.50	$ 3,338.65
1998 / 1	$ 4,035.85	$ 1,246.25	$ 2,789.60
1998 / 2	$ 3,414.95	$ 1,054.52	$ 2,360.43
1998 / 3	$ 2,173.15	$ 671.06	$ 1,502.09
1998 / 4	$ 4,035.85	$ 1,246.25	$ 2,789.60
1999 / 1	$ 4,095.00	$ 942.25	$ 3,152.75
1999 / 2	$ 3,465.00	$ 797.29	$ 2,667.71
1999 / 3	$ 2,205.00	$ 507.37	$ 1,697.63
1999 / 4	$ 4,095.00	$ 942.25	$ 3,152.75
2000 / 1	$ 4,199.65	$ 2,587.00	$ 1,612.65
2000 / 2	$ 3,553.55	$ 2,189.00	$ 1,364.55
2000 / 3	$ 2,261.35	$ 1,393.00	$ 868.35
2000 / 4	$ 4,199.65	$ 2,587.00	$ 1,612.65
2001 / 1	$ 4,345.25	$ 3,281.75	$ 1,063.50
2001 / 2	$ 3,676.75	$ 2,776.87	$ 899.88
2001 / 3	$ 2,339.75	$ 1,767.08	$ 572.67
2001 / 4	$ 4,345.25	$ 1,313.02	$ 3,032.23
2002 / 1	$ 4,459.00	$ 3,627.25	$ 831.75
2002 / 2	$ 3,773.00	$ 3,069.21	$ 703.79
2002 / 3	$ 2,401.00	$ 1,953.13	$ 447.87
2002 / 4	$ 4,459.00	$ 3,627.25	$ 831.75
2003 / 1	$ 4,636.45	$ 4,373.25	$ 263.20
2003 / 2	$ 3,923.15	$ 3,700.44	$ 222.71
2003 / 3	$ 2,496.55	$ 2,354.83	$ 141.72
2003 / 4	$ 4,636.45	$ 4,373.25	$ 263.20
2004 / 1	$ 4,823.00	$ 0.00	$ 4,823.00
2004 / 2	$ 4,081.00	$ 0.00	$ 4,081.00
2004 / 3	$ 2,597.00	$ 0.00	$ 2,597.00
		TOTAL NET BACKPAY	**$ 68,041.77**

Verna Fugere (Specification Schedule B–5)

Year / Quarter	Gross Backpay	Interim Earnings	Net Backpay
1995 / 2	$ 1,280.00	$ 0.00	$ 1,280.00
1995 / 3	$ 4,160.00	$ 0.00	$ 4,160.00
1995 / 4	$ 4,800.00	$ 0.00	$ 4,800.00
1996 / 1	$ 4,284.80	$ 1,575.00	$ 2,709.80
1996 / 2	$ 4,284.80	$ 1,575.00	$ 2,709.80
1996 / 3	$ 4,284.80	$ 1,575.00	$ 2,709.80
1996 / 4	$ 4,944.00	$ 1,575.00	$ 3,369.00
1997 / 1	$ 4,456.40	$ 0.00	$ 4,456.40
1997 / 2	$ 4,456.40	$ 0.00	$ 4,456.40
1997 / 3	$ 4,456.40	$ 0.00	$ 4,456.40
1997 / 4	$ 5,142.00	$ 0.00	$ 5,142.00
1998 / 1	$ 4,633.20	$ 0.00	$ 4,633.20
1998 / 2	$ 4,633.20	$ 0.00	$ 4,633.20
1998 / 3	$ 4,633.20	$ 0.00	$ 4,633.20
1998 / 4	$ 5,346.00	$ 0.00	$ 5,346.00
1999 / 1	$ 4,700.80	$ 956.36	$ 3,744.44
1999 / 2	$ 4,700.80	$ 956.36	$ 3,744.44
1999 / 3	$ 4,700.80	$ 956.36	$ 3,744.44
1999 / 4	$ 5,424.00	$ 956.36	$ 4,467.64
2000 / 1	$ 4,825.60	$ 2,041.57	$ 2,784.03
2000 / 2	$ 4,825.60	$ 2,041.57	$ 2,784.03
2000 / 3	$ 4,825.60	$ 2,041.57	$ 2,784.03
2000 / 4	$ 5,568.00	$ 2,041.57	$ 3,526.43
2001 / 1	$ 4,992.00	$ 2,976.44	$ 2,015.56
2001 / 2	$ 4,992.00	$ 2,976.44	$ 2,015.56
2001 / 3	$ 4,992.00	$ 2,976.44	$ 2,015.56
2001 / 4	$ 5,760.00	$ 2,976.44	$ 2,783.56
2002 / 1	$ 5,122.00	$ 3,822.84	$ 1,299.16
2002 / 2	$ 5,122.00	$ 3,822.84	$ 1,299.16
2002 / 3	$ 5,122.00	$ 3,822.84	$ 1,299.16
2002 / 4	$ 5,910.00	$ 3,822.84	$ 2,087.16
2003 / 1	$ 5,324.80	$ 0.00	$ 5,324.80
2003 / 2	$ 5,324.80	$ 0.00	$ 5,324.80
2003 / 3	$ 5,324.80	$ 0.00	$ 5,324.80
2003 / 4	$ 6,144.00	$ 0.00	$ 6,144.00
2004 / 1	$ 5,538.00	$ 0.00	$ 5,538.00
2004 / 2	$ 5,538.00	$ 0.00	$ 5,538.00
2004 / 3	$ 5,538.00	$ 0.00	$ 5,538.00
		TOTAL NET BACKPAY:	**$140,621.96**

Florence Feliczak (Specification Schedule B–6)

Feliczak did not have any interim earnings. Therefore her net backpay equals her gross backpay which, as set forth above, totals $71,769.36.

Dale R. Smith (Specification Schedule B–7)

Year / Quarter	Gross Backpay	Interim Earnings	Net Backpay
1995 / 2	$ 1,920.00	$ 0.00	$ 1,920.00
1995 / 3	$ 3,120.00	$ 0.00	$ 3,120.00
1995 / 4	$ 3,600.00	$ 0.00	$ 3,600.00
1996 / 1	$ 3,120.00	$ 0.00	$ 3,120.00
1996 / 2	$ 3,120.00	$ 4,131.73	$ 0.00
1996 / 3	$ 3,120.00	$ 4,131.73	$ 0.00
1996 / 4	$ 3,120.00	$ 0.00	$ 3,120.00
1997 / 1	$ 3,120.00	$ 0.00	$ 3,120.00
1997 / 2	$ 3,120.00	$ 0.00	$ 3,120.00
1997 / 3	$ 3,120.00	$ 0.00	$ 3,120.00
1997 / 4	$ 3,600.00	$ 923.72	$ 2,676.28
1998 / 1	$ 3,120.00	$ 488.96	$ 2,631.04
1998 / 2	$ 3,120.00	$ 0.00	$ 3,120.00
1998 / 3	$ 3,120.00	$ 0.00	$ 3,120.00
1998 / 4	$ 3,600.00	$ 0.00	$ 3,600.00
1999 / 1	$ 3,120.00	$ 0.00	$ 3,120.00
1999 / 2	$ 3,120.00	$ 0.00	$ 3,120.00
1999 / 3	$ 3,120.00	$ 5,591.72	$ 0.00
1999 / 4	$ 4,386.00	$ 5,618.00	$ 0.00
2000 / 1	$ 3,801.20	$ 0.00	$ 3,801.20
2000 / 2	$ 3,801.20	$ 6,429.66	$ 0.00
2000 / 3	$ 3,801.20	$ 6,429.66	$ 0.00
2000 / 4	$ 4,386.00	$ 6,418.86	$ 0.00
2001 / 1	$ 3,801.20	$ 7,016.36	$ 0.00
2001 / 2	$ 3,801.20	$ 7,035.08	$ 0.00
2001 / 3	$ 3,801.20	$ 7,035.08	$ 0.00
2001 / 4	$ 4,386.00	$ 7,035.08	$ 0.00
2002 / 1	$ 3,801.20	$ 4,280.20	$ 0.00
2002 / 2	$ 3,801.20	$ 4,307.56	$ 0.00
2002 / 3	$ 3,801.20	$ 4,327.00	$ 0.00
2002 / 4	$ 4,386.00	$ 4,327.00	$ 59.00
2003 / 1	$ 3,801.20	$ 535.25	$ 3,265.95
2003 / 2	$ 3,801.20	$ 535.25	$ 3,265.95
2003 / 3	$ 3,801.20	$ 535.25	$ 3,265.95
2003 / 4	$ 4,386.00	$ 535.25	$ 3,850.75
2004 / 1	$ 3,801.20	$ 3,990.00	$ 0.00
2004 / 2	$ 3,801.20	$ 3,990.00	$ 0.00
2004 / 3	$ 3,801.20	$ 0.00	$ 3,801.20
		TOTAL:	**$ 66,937.32**

5 As discussed above, Respondent provided Smith a health insurance benefit, which Smith lost when unlawfully discharged. Respondent must reimburse Smith for the costs of obtaining substitute health insurance. Based on testimony of Smith, and Compliance Officer Zane, I conclude

that Specification Schedule C accurately sets forth the losses Smith sustained in obtaining other health insurance coverage. The total amount if $12,792.35.

Accordingly, Respondent must pay to Smith the sum of the net backpay ($66,937.32) and the health insurance reimbursement ($12,692.35). That amount is $79,629.67.

Tom Belongia (Specification Schedule B–8)

Belongia had no interim earnings. Therefore, I conclude that his total net backpay is the same as the total gross backpay, $150,438.40.

David Monton (Specification Schedule B–9)

Monton also did not have interim earnings. His total net backpay is the same as his total gross backpay: $128,437.20.

Art Burkel (Specification Schedule B–10)

Year / Quarter	Gross Backpay	Interim Earnings	Net Backpay
1995 / 3	$ 1,928.85	$ 0.00	$ 1,928.85
1995 / 4	$ 3,582.15	$ 1,920.00	$ 1,662.15
		TOTAL NET BACKPAY:	**$ 3,591.00**

Bruce Kent (Specification Schedule B–11)

Kent did not have interim earnings. His net backpay therefore equals his total gross backpay: $29,830.32.

Summary of Net Backpay

In considering the following backpay figures, it is important to note that these amounts only cover the calendar quarters specifically listed in Specification Schedules B–1 through B–11. However, for the reasons stated above, I have found that the backpay periods for following discriminatees have not ended: Karen A. Gajewski, Verna Fugere, Florence Feliczak, Dale R. Smith, Tom Belongia, David Monton, and Bruce Kent. Gross backpay for these individuals continues to accrue.

Additionally, the figures below do not include the interest which Respondent must pay, along with the backpay itself, to make the discriminatees whole. That interest will be calculated in accordance with Board policy as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Moreover, the figures summarized below represent the backpay amounts *before* the withholding of taxes as may be required by federal, state, and municipal law.

Subject to these qualifications, and for the period covered by the Compliance Specification, Respondent's obligation to make whole the discriminatees be satisfied by payment to them of the following net backpay amounts:

Discriminatee Total Net Backpay:

Melissa A. Kukla	$ 31,305.66		Dale R. Smith	$ 79,629.67
Jane E. Myers	$ 12,944.40		Tom Belongia	$150,438.40
Amanda Lange	$ 14,266.16		David Monton	$128,437.20
Karen A. Gajewski	$ 68,041.77		Art Burkel	$ 3,591.00
Verna Fugere	$140,621.96		Bruce Kent	$ 29,830.32
Florence Feliczak	$ 71,769.36			

Accordingly, I issue the following recommended

ORDER[1]

Respondent, FiveCAP, Inc., its officers, agents, successors and assigns, shall pay to each of the discriminatees listed immediately above the amount set forth to the right of the discriminatee's name, after making tax deductions in compliance with federal, state and municipal law, together with interest as computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Dated in Washington, DC

Keltner W. Locke
Administrative Law Judge

[1] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.